DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-794
Title: Randy White, Warden, Petitioner
v.
Robert Keith Woodall
Docketed: January 3, 2013
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (09-5352, 09-5406)
Decision Date: July 12, 2012
Rehearing Denied: October 3, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 26 2012	Petition for a writ of certiorari filed. (Response due February 4, 2013)
Dec 26 2012	Appendix of Randy White, Warden filed.
Jan 25 2013	Order extending time to file response to petition to and including March 6, 2013.
Mar 6 2013	Brief of respondent Robert Keith Woodall in opposition filed.
Mar 6 2013	Motion for leave to proceed in forma pauperis filed by respondent Robert Keith Woodall.
Mar 20 2013	DISTRIBUTED for Conference of April 12, 2013.
Mar 25 2013	Reply of petitioner Randy White, Warden filed. (Distributed)
Apr 9 2013	Record Requested .
Apr 10 2013	Record received for the U.S. Court of Appeals for the Sixth Circuit and for the U.S. District Court for the Western District of Kentucy are electronically filed and available on PACER.
Apr 16 2013	DISTRIBUTED for Conference of May 9, 2013.
Apr 26 2013	Record received from U.S. District Court for the Western District of Kentucky at Paducah (2 boxes.)
Apr 30 2013	DISTRIBUTED for Conference of May 16, 2013.
May 20 2013	DISTRIBUTED for Conference of May 23, 2013.
May 28 2013	DISTRIBUTED for Conference of May 30, 2013.
Jun 3 2013	DISTRIBUTED for Conference of June 6, 2013.
Jun 10 2013	DISTRIBUTED for Conference of June 13, 2013.
Jun 17 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 25 2013	DISTRIBUTED for Conference of June 26, 2013.
Jun 27 2013	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.

Jun 27 2013	Petition GRANTED.
Jul 12 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 11, 2013.
Jul 18 2013	Motion to appoint counsel filed by respondent Robert Keith Woodall.
Jul 24 2013	Motion DISTRIBUTED for Conference of September 30, 2013.
Sep 11 2013	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the petitioner and counsel for the respondent.
Sep 11 2013	Joint appendix filed. (Statement of costs filed)
Sep 11 2013	Brief of petitioner Randy White, Warden filed.
Sep 17 2013	SET FOR ARGUMENT ON Wednesday December 11, 2013.
Sep 17 2013	CIRCULATED
Sep 17 2013	Brief amici curiae of Arizona and Thirteen Other States filed. (Distributed)
Sep 18 2013	Brief amicus curiae of Texas filed. (Distributed)
Sep 18 2013	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Oct 1 2013	The time to file respondent's brief on the merits is extended to and including November 12, 2013.
Oct 7 2013	Motion to appoint counsel filed by respondent GRANTED. Laurence E. Komp, Esquire, of Manchester, Missouri, is appointed to serve as counsel for the respondent in this case.
Nov 12 2013	Brief of respondent Robert Keith Woodall filed. (Distributed)
Nov 19 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Nov 19 2013	Brief amicus curiae of Los Angeles County Public Defender's Office filed. (Distributed)
Dec 3 2013	Reply of petitioner Randy White, Warden filed. (Distributed)
Dec 11 2013	Argued. For petitioner: Susan R. Lenz, Assistant Attorney General, Frankfort, Ky. For respondent: Laurence E. Komp, Manchester, Mo. (Appointed by this Court.)

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

12-794

No. 12-_____

Supreme Court, U.S.
FILED
DEC 26 2012
OFFICE OF THE CLERK

Supreme Court of the United States

RANDY WHITE, WARDEN,
Petitioner,

v.

ROBERT KEITH WOODALL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz*
Assistant Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342
susan.lenz@ag.ky.gov

Counsel for Petitioner
RANDY WHITE, WARDEN

* Counsel of Record

Library of Congress
Law Library

CAPITAL CASE
QUESTIONS PRESENTED

Robert Keith Woodall, amidst overwhelming evidence of his guilt, pled guilty to kidnapping, raping, and murdering a 16-year-old child, and thus pled guilty to all aggravating circumstances. At the penalty phase trial, the prosecutor elected to present evidence of guilt and the circumstances of the crimes. Woodall did not testify; and his request that the jury be instructed not to draw any adverse inference from his decision not to testify (a "no adverse inference instruction") was denied. He was sentenced to death by a Kentucky jury. The Kentucky Supreme Court affirmed.

Even though this Court has never held that a defendant is entitled to a no adverse inference instruction at the sentencing phase of a trial where the defendant has pled guilty to the offense and all aggravating circumstances, the Sixth Circuit granted habeas relief to Woodall on the ground that the trial court's failure to provide such an instruction violated his Fifth Amendment right against self-incrimination. The questions presented are:

1. Whether the Sixth Circuit, violated 28 U.S.C. §2254(d)(1) by granting habeas relief on the trial court's failure to provide a no adverse inference instruction even though this Court has not "clearly established" that such an instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to the crimes and aggravating circumstances.

2. Whether the Sixth Circuit violated the harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in ruling that the absence of a no adverse inference instruction was not harmless in spite of overwhelming evidence of guilt and in the face of a guilty plea to the crimes and aggravators.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. Legal Background 3

B. Facts 6

C. Procedural History 8

1. Caldwell Circuit Court 8

2. Kentucky Supreme Court 9

3. Magistrate Judge's Report 11

4. United States District Court 12

5. United States Court of Appeals for the Sixth Circuit 12

REASONS FOR GRANTING THE WRIT 15

I. The Sixth Circuit violated 28 U.S.C. §2254(d) when it used federal habeas corpus review as a vehicle to second-guess the reasonable decision of the Kentucky Supreme Court and when it granted relief in the absence of "clearly established Federal law, as determined by [this Court]." . . 15

II. The Sixth Circuit improperly converted the *Brecht v. Abrahamson* "substantial and injurious effect" harmless error standard into a "possible-harm" standard. 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Bobby v. Van Hook,
130 S.Ct. 13, 20 (2009) 24

Brecht v. Abrahamson,
507 U.S. 619 (1993) 12, 21, 22, 23

Burr v. Pollard,
546 F.3d 828 (7th Cir.2008) 20

Calderon v. Coleman,
525 U.S. 141, 146 (1998) 22

Carey v. Musladin,
549 U.S. 70, 74 (2006) 17

Carter v. Kentucky,
450 U.S. 288 (1981)
. . . . . 3, 4, 9, 12, 13, 14, 15, 17, 18, 19

Delo v. Lashley,
507 U.S. 272, 278-279 (1993) 24

Edwards v. Roper,
688 F.3d 449, 461 (8th Cir. 2012) 19

TABLE OF AUTHORITIES

Page

Estelle v. Smith,
451 U.S. 454 (1981) 3, 4, 9, 10, 12, 13, 14, 15, 18, 19

Finney v. Rothgerber,
751 F.2d 858, 863-64 (6th Cir.1985) 13

Fry v. Pliler,
127 S.Ct. 2321 (2007) 22

Harrington v. Richter,
131 S.Ct. 770 (2011) 16

Howes v. Fields,
132 S.Ct. 1181, 1187 (2012) 17

Ketchings v. Jackson,
365 F.3d 509 (6th Cir.2004) 20

Kotteakos v. United States,
328 U.S. 750 (1946) 22

Knowles v. Mirzayance,
556 U.S. 111, 122 (2009) 17

Lee v. Crouse,
451 F.3d 598, 605-06 (10th Cir.2006) 20

TABLE OF AUTHORITIES

Page

Meece v. Commonwealth,
348 S.W. 3d 627, 723 (Ky. 2011) 11

Miller v. Lafler,
2012 WL 5519677 (6th Cir.Nov. 14, 2012) 20

Miranda v. Arizona,
384 U.S. 436 (1966) 4

Mitchell v. United States,
526 U.S. 314 (1999),
. . . . . 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21

O'Neal v. McAninch,
513 U.S. 432, 437 (1995) 23

Panetti v. Quarterman,
551 U.S. 930, 953 (2007) 16

Parker v. Matthews,
132 S.Ct. 2148, 2149 (2012) 15

Skaggs v. Commonwealth,
694 S.W 2d 672, 681 (Ky. 1985) 11

United States v. Caro,
597 F.3d 608, 629 (4th Cir.2010) 19

TABLE OF AUTHORITIES

Page

United States v. Kennedy,
499 F.3d 547 (6th Cor.2007) 20

United States v. Cooper,
91 F.Supp.2d 90, 112-13 (D.D.C.2000) 19

United States v. Roman,
371 F.Supp.2d 36, 50 (D.P.R.2005) 19

United States v. Romero-Rendon,
220 F.3d 1159, 1163 n. 4 (9th Cir.2000) *20*

United States v. Ronquillo,
508 F.3d 744, 749 (5th Cir.2007) 20

United States v. Seward,
583 F.3d 1045, 1048-49 (8th Cir.2009) 20

United States v. Whitten,
623 F.3d 125, 131-132 (2nd Cir.2010) 19

Woodall v. Commonwealth,
63 S.W.3d 104, 115 (Ky. 2002) 9

Woodall v. Simpson,
685 F.3d 574 (6th Cir.2010) 20

TABLE OF AUTHORITIES

PAGE

KENTUCKY CRIMINAL RULES

Kentucky Criminal Rule 9.82(1) 11

Kentucky Criminal Rule 9.88 11

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the U.S. Constitution 10, 12, 14, 18, 19, 20

OTHER SOURCES

AEDPA 13, 15, 16, 17, 19, 21, 22

28 U.S.C. Section 2254(d)(1) 3, 16

APPENDIX

1. Opinion, U.S. Court of Appeals for the Sixth Circuit 1a-29a

2. Opinion, U.S. District Court 30a-173a

3. Magistrate Judge's Report and Recommendation, U.S. District Court 174a-258a

4. Opinion, Kentucky Supreme Court ... 259a-312a

5. Order, U.S. Court of Appeals for the Sixth Circuit 313a

6. Judgment, U.S. Court of Appeals for the Sixth Circuit 314a-315a

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Kentucky respectfully petitions for a writ of *certiorari* to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit (App. 1a-29a) is reported at 685 F.3d 574. The opinion of the district court (App. 30a-173a) is unreported, but can be found at 2009 WL 464939. The opinion of the magistrate judge (App. 174a-258a) is unreported, but can be found at 2008 WL 5666261. The opinion of the Kentucky Supreme Court (App. 259a-312a) is reported at 63 S.W.3d 104.

STATEMENT OF JURISDICTION

The Sixth Circuit entered its judgment on July 12, 2012. App. 314a-315a. A petition for rehearing *en banc* was denied on October 3, 2012. App. 313a. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254. The Sixth Circuit granted Petitioner's motion to stay issuance of the mandate pending review by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

> "No person shall be . . . compelled in any criminal case to be a witness against himself . . ."

28 U.S.C. §2254(d)(1)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Legal Background

The first question presented by this petition concerns whether the Sixth Circuit disregarded the limits Congress imposed on federal habeas review in 28 U.S.C. §2254(d)(1) when it ruled that a no adverse inference instruction is required in the penalty phase of a capital trial where the defendant has pled guilty to all crimes and aggravating circumstances — and when it ruled the Kentucky Supreme Court's ruling to the contrary was unreasonable. This Court has never squarely addressed whether a no adverse inference instruction is constitutionally required in the penalty phase of a trial, where a non-testifying defendant has pled guilty to *all* the crimes and aggravating circumstances.

The three decisions of this Court to which the Sixth Circuit looked are *Carter v. Kentucky*, 450 U.S. 288 (1981), *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999). In *Carter*, the Court held that when a defendant makes a proper request, the trial court must instruct the jury, in the *guilt* phase of a trial, that a defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt. In that case, the defendant introduced no evidence at all on behalf of the defense in either the guilt or the penalty phase of the trial. The trial court refused the defendant's requested instruction that his failure to testify in the guilt phase could not be used as an inference of guilt. This Court ruled that the trial court should have given

the requested no adverse inference instruction. The rule in *Carter* helps to protect a non-testifying defendant, in the guilt phase of trial, from an inference of guilt by virtue of his or her silence.

In *Estelle v. Smith*, which also did not involve a guilty plea and which did not mention *Carter*, Smith was not advised of his right to remain silent at a pre-trial psychiatric examination and defense counsel was not notified prior to the penalty phase that the examining psychiatrist would testify. The State then used the substance of Smith's *Miranda*[1]-violative disclosures during the pre-trial psychiatric examination against Smith during the penalty phase. This Court found that Smith had been denied his Fifth Amendment right to remain silent and his Sixth Amendment right to assistance of counsel in submitting to the pre-trial psychiatric interview. This Court stated, "*[i]n these distinct circumstances*, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated." *Id.*, at 466 (Emphasis added).

Finally, in *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine. She reserved the right to contest at her sentencing the amount of the cocaine, which would determine the range of penalties. She only admitted that she had done "some of" the proffered conduct. She did not testify; however, three other co-defendants did testify as to the amounts of cocaine she had sold. The sentencing court relied on the testimony of the

---

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

co-defendants due to Mitchell not testifying to the contrary. The sentencing court also specifically told Mitchell: "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times . . . I'm taking the position that you should come forward and explain your side of this issue." *Mitchell*, at 319.

This Court pointed out that "[t]he Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Mitchell*, at 330. The Court would not permit a negative inference to be drawn about Mitchell's guilt with regard to factual determinations respecting the circumstances and details of the crime. This Court also noted, "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility . . . is a separate question. It is not before us and we express no view on it." *Id.* The *Mitchell* Court was clearly concerned with requiring the state to produce evidence against a defendant and not allowing the state to force the evidence from a defendant's "own lips." *Mitchell*, at 326.

The four dissenting justices in *Mitchell* criticized the majority's holding and its refusal to address whether its holding applied to situations other than where a sentencing court was determining the facts of the offense. In the dissenting opinion, Justice Scalia further noted that "the threat of an adverse inference does not 'compel' anyone to testify." *Id.*, at 331.

B. Facts

On January 25, 1997, in Muhlenberg County, Kentucky, Robert Keith Woodall kidnapped 16-year-old Sarah Hansen, slashed her throat twice, raped her, and threw her in a nearby icy cold lake leaving her to drown.

At the time of her death, Sarah Hansen was a high school cheerleader, an honor student, an "incredible trumpet player," a member of both the National Honor Society and the Beta Club, and a medalist in swimming and diving.

On the night of her murder, Sarah had planned to watch a video with her family and her boyfriend. She drove the family mini-van to the local Minit Mart to rent a movie. Just before she left her home, her mother walked her to the door, saying, "Bye bye, I love you." Sarah's mother never saw her alive again.

Woodall, who did not know Sarah and who had just gotten out of prison for serving time on a conviction for two counts of sexual abuse and who had also sexually abused two of his young cousins, was in the Minit Mart around the same time as Sarah. Woodall was angry because his girlfriend was out with friends. Another girl had walked into the Minit Mart right before Sarah, and Woodall had remarked he would like to "have a piece of that."

When Sarah failed to return home after a few hours, her family called the police. The police subsequently found the mini-van Sarah had been driving lodged in a ditch at a lake approximately 1.5 miles from the Minit Mart. A large amount of Sarah's blood was in the ditch just under the driver's

door and large amounts of her blood were everywhere inside the van, including the driver's seat, steering wheel, gear shift lever and ignition switch. A box cutter with Sarah's blood on it was found near the van.

The police followed a trail of blood from the van down a gravel road. The bloody trail continued for 400-500 feet before it trickled out. There were then drag marks from that point out to the dock of the lake. The drag marks extended out to the edge of the dock. Sarah's unclothed body was found floating in the water next to the dock.

Her throat had been deeply slashed twice. Each cut was 3.5 to 4 inches long. In addition to her trachea having been severed (which would have rendered Sarah unable to speak), multiple muscles supporting Sarah's head and neck were also severed. Sarah had multiple bruises and abrasions on her head and face and all over the rest of her body. She had drown to death.

After Woodall abducted Sarah, raped, and murdered her, he went to his mother's house where he fell asleep in a recliner watching television.

A bloody tennis shoe print matching Wooodall's shoes was found on the pier next to Sarah's body. Woodall's fingerprints were found on and in the van. Muddy and wet clothing was found under Woodall's bed. Sarah's blood was found on Woodall's jeans and sweatshirt. Woodall's DNA was found on Sarah's vaginal swabs. Faced with overwhelming evedence of guilt, Woodall, who initially gave conflicting statements regarding his activities on the night he murdered Sarah, pled guilty to all of the crimes and

aggravating circumstances, and, after a penalty phase trial, received a death sentence and two life sentences.

C. Procedural History

1. Caldwell Circuit Court

During Woodall's penalty phase trial, where the prosecutor elected to present the overwhelming evidence of Woodall's guilt even though Woodall had pled guilty to all crimes and aggravating circumstances, the trial court discussed the jury instructions, out of the hearing of the jury, with both the prosecutor and trial defense counsel.

Trial defense counsel asked the trial court to instruct the jury not to speculate about Woodall's decision not to testify. The prosecutor did not object. The trial court declined to give the instruction, stating it was aware of no case law that precluded "the jury from considering the defendant's lack of expression of remorse or explanation of the crime or anything else once guilt has been adjudged in sentencing." The trial court further stated it was not logical to tell the jury that the law of Kentucky is "that you can go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that." The trial court never indicated it would use Woodall's silence against him and never told the jury that it could do so.

2. Kentucky Supreme Court

On direct appeal, Woodall argued that a combination reading of *Carter*, *Estelle*, and *Mitchell* constitutionally required a no adverse inference instruction be given in the penalty phase after the entry of a guilty plea. The Kentucky Supreme Court carefully considered each case and disagreed. The court distinguished the facts, and therefore the applicability of the limited holdings in *Carter*, *Estelle*, and *Mitchell* to Woodall's case. *Woodall v. Commonwealth*, 63 S.W.3d 104, 115 (Ky. 2002). App. 259a-263a.

First, the Kentucky Supreme Court noted that the no adverse inference instruction contemplated in the guilt phase in *Carter* was used to protect a non-testifying defendant from appearing to be guilty because of a decision to not testify. Given that Woodall had pled guilty to all of the charged crimes, as well as the aggravating circumstances, there was no need for the jury to make any additional inferences of guilt. The court also noted that any possible error would be nonprejudicial because Woodall had admitted the crimes and evidence of his guilt was overwhelming. App. 261a-262a.

The Kentucky Supreme Court then considered *Estelle* and Woodall's argument that *Estelle* extended the Fifth Amendment protection, and thus the *Carter* instruction to the penalty phase of a trial. The Kentucky Supreme Court noted that *Estelle* was not a guilty plea case, not a jury instruction case, did not cite to *Carter*, and did not indicate that *Carter* had been extended. *Estelle* involved the use of an

out-of-court statement the defendant made to a government psychiatric expert. The statement was used against the defendant without warning in the penalty trial. The court noted that Woodall had not contested any of the facts and had not been compelled to testify so as to implicate the Fifth Amendment privilege as in *Estelle*. App. 262a.

In addition, the Kentucky Supreme Court found that *Mitchell* was distinguishable and did not apply. In *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine. She reserved the right to contest the amount of the cocaine at her sentencing. The amount of the cocaine would determine what the range of penalties would be. She only admitted to "some of" the charged conduct. A sentencing hearing was held to determine the facts and circumstances surrounding the crimes. The sentencing court specifically told Mitchell it held her silence against her. The Kentucky Supreme Court noted that Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes. App. 262a-263a.

In addition to finding no error, the Kentucky Supreme Court further ruled, even if there were error, any possible error would be non-prejudicial because Woodall admitted to the crimes and aggravating circumstances and the evidence of guilt was overwhelming. App. 263a.

One justice dissented, pointing out that while Woodall did not contest any of the facts or aggravating

circumstances, he did contest the requested penalty of death.[2] App. 309a-311a.

3. Magistrate Judge's Report

The magistrate judge's report recommended that the district court reject Woodall's claim and concluded that the Kentucky Supreme Court's adjudication of the claim was not contrary to or an unreasonable application of United States Supreme Court precedents. App. 176a-184a.

The magistrate judge noted Woodall had argued that absent the instruction, the jury may have drawn an improper inference of lack of remorse due to his silence. The magistrate judge pointed out that *Mitchell* specifically stated that the Court expressed no opinion on whether silence bears upon the determination of a lack of remorse or upon acceptance of responsibility. App. 182a.

---

[2]The jury does not have to find that death is the appropriate penalty beyond a reasonable doubt or to resolve any reasonable doubt in favor of a prison sentence. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 680 (Ky. 1985); *Meece v. Commonwealth*, 348 S.W.3d 627, 723 (Ky. 2011). Kentucky law requires that all twelve jurors agree upon the verdict, including the sentence verdict, and the failure to do so in the penalty phase requires a penalty phase retrial. Kentucky Criminal Rules 9.82(1) and 9.88; *Skaggs v. Commonwealth*, 694 S.W.2d 672, 681 (Ky. 1985). In other words, Kentucky does not follow the "one juror veto" rule adopted in some States that permits a single juror to preclude a death sentence and in effect require that the court impose a prison sentence.

4. United States District Court

The United States District Court read *Carter*, *Estelle*, and *Mitchell* together and stated, "[t]here is but one reasonable conclusion that can be reached — a capital defendant has a Fifth Amendment right to a no adverse inference instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement." App. 58a.

The district court engaged in a harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) and concluded the alleged error was not harmless because the court could not "say for certain that the jury did not" hold Woodall's failure to testify against him. App. 61a-63a.

5. United States Court of Appeals for the Sixth Circuit

A divided panel (2-1) of the Sixth Circuit granted a writ in Woodall's favor entitling him to a new sentencing trial.

Judge Martin, joined by Judge Griffin, generalized the holdings in *Carter*, *Estelle*, and *Mitchell*, and concluded that Woodall, who had pled guilty to all the charged crimes and aggravating circumstances and did not contest the facts and circumstances of the crimes, was entitled to a no adverse inference instruction in the penalty phase of his trial. App. 4a-9a.

Specifically, the Sixth Circuit found that *Estelle* extended a defendant's entitlement to Fifth Amendment protection to the penalty phase and that *Mitchell* extended Fifth Amendment protection even

where a defendant has pled guilty. App. 6a-9a. The Sixth Circuit then cited to one of its own cases, *Finney v. Rothgerber,* 751 F.2d 858, 863-64 (6th Cir.1985)[3], for the proposition that Woodall was entitled to a no adverse inference instruction once he requested it. App. 7a.

While suggesting that the refusal to give a no adverse inference instruction might never be harmless, the majority stated, "[b]ecause we cannot know what led the jury to make the decision that it did, and because the jury may well have based its decision on Woodall's failure to testify, we cannot conclude that this is a case of 'harmless error.'" App. 11a.

Judge Cook, dissenting (App. 12a-29a.), found that "despite a mountain of undisputed evidence that petitioner abducted, raped, maimed, and drowned a sixteen-year-old high school student," the Sixth Circuit opinion disregarded the Kentucky Supreme Court's analysis and found a violation of clearly established law, and "ultimately resolves the matter in favor of speculation, worrying that the jury may have punished petitioner for failing to testify," and in so doing, defied AEDPA deference and this Court's harmless error teachings. App. 12a-13a.

Judge Cook pointed out that neither *Estelle* nor *Mitchell* extended the *Carter* remedy — a right to a no adverse inference instruction — to the circumstances

---

[3]The Sixth Circuit, in *Finney*, indicated Finney was entitled to have the jury instructed that no inference of guilt could be drawn from his failure to testify in the persistent felony offender phase of his trial where the prosecutor still had to prove Finney was guilty of being a persistent felony offender.

presented in this case. App. 19a. Furthermore, both *Estelle* and *Mitchell* involved government or court actions that penalized the defendant by exposing the defendant to greater punishment for exercising the Fifth Amendment privilege; and most importantly, the state did not shift its burden of proving a disputed aggravating factor to Woodall. App. 21a-22a. In sum, the punitive element so critical in *Estelle* and *Mitchell* — the state's use of the defendant's silence to impose greater punishment — is wholly absent in Woodall's case. App. 22a.

Judge Cook noted that the state neither sought an adverse inference nor opposed Woodall's request for a *Carter* instruction. In the absence of disputed facts, Woodall's silence would demonstrate only a lack of remorse. "Considering that *Mitchell* expressly exempted lack-of-remorse and acceptance-of-responsibility findings from its holding, 26 U.S. at 330, the state has good reason to believe that the Fifth Amendment did not require a *Carter* instruction here." App. 22a.

In discussing harmless error, Judge Cook stated, "The majority compounds its error by engaging in a form of *possible*-harm review that verges on a presumption of prejudice. This leniency appears both in its emphasis on dicta opining about the likelihood that juries draw adverse inferences, and in its ultimate finding of a 'very real risk' of prejudice. Alas, the correct harmless-error standard does not permit such speculation, and neither does the undisputed evidence of this heinous crime." App. 24.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit violated 28 U.S.C. §2254(d) when it used federal habeas corpus review as a vehicle to second-guess the reasonable decision of the Kentucky Supreme Court and when it granted relief in the absence of "clearly established Federal law, as determined by [this Court]."

The Sixth Circuit's decision "is a textbook example of what the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.'" *Parker v. Matthews,* 132 S.Ct. 2148, 2149 (2012) (recently reversing the Sixth Circuit for substituting its own interpretation of Kentucky law in a capital case). One of AEDPA's primary innovations was barring federal courts from granting habeas relief, in the face of a state court denial of relief on the merits, if there is no "clearly established Federal law, as determined by [this Court]" on the issue. Yet that is precisely what the Sixth Circuit did here.

The Sixth Circuit reasoned that the logic of *Carter*, *Estelle*, and *Mitchell* logically extend to this case. They do not. Those decisions do not suggest that a person such as Woodall, who had pled guilty to all the charged crimes and aggravating circumstances and who did not contest the facts and circumstances of the crimes, is entitled to a no adverse inference instruction in the penalty phase of his trial. More fundamentally, it was not the province of the Sixth Circuit to engage in that

speculation in this case. Section 2254(d)(1) barred the Sixth Circuit from granting habeas relief based on a rule of its own, not this Court's, devising.

Under 28 U.S.C. §2254(d)(1), a writ of habeas corpus may not be granted on a claim that a state court has resolved on the merits unless the decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In *Harrington v. Richter*, 131 S.Ct. 770 (2011), this Court clarified the limited scope of habeas review under that provision.

> Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id., at 786-787 (Citations omitted).

AEDPA does not require a "nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), but the legal rule must be "squarely established" by this Court.

Knowles v. Mirzayance., 556, U.S. 111, 122 (2009). *See also, Howes v. Fields*, 132 S.Ct. 1181, 1187 (2012). Clearly established federal law refers to the holdings, as opposed to the dicta, of decisions of this Court at the time of the relevant state court decision. *Carey v. Musladin*, 549 U.S. 70, 74 (2006).

Although the Sixth Circuit's reading of the applicable case law is one way to synthesize the cases, this Court has not squarely addressed the legal proposition advanced here — that Woodall was entitled to a prophylactic instruction in the penalty phase of trial where the facts and circumstances of the crimes were not in dispute. The Sixth Circuit's proposed application is subject to fairminded disagreement.

As noted in Judge Cook's dissent, the Kentucky Supreme Court did not believe that this Court's holdings clearly established the right to a *Carter* instruction in the penalty phase of a capital trial where the defendant has pled guilty to all the crimes and aggravating circumstances and where the facts and circumstances of the crimes are not in dispute. Despite thorough consideration by the Kentucky Supreme Court, "[t]he majority improperly dismisses their judgment (as well as the Report and Recommendation of the federal magistrate judge) without so much as a nod to the standard that the judgment be beyond the purview of fairminded jurists. This stance not only flouts the AEDPA standard, but also undermines the animating purposes of AEDPA deference: comity, finality, and federalism." App. 23a. AEDPA deference precludes the majority from substituting its judgment for that of the State's highest court.

Although *Estelle* and *Mitchell* generally recognize that the Fifth Amendment privilege extends to the sentencing phase of criminal trials and that a generic guilty plea does not waive the right, neither case extended the *Carter* remedy — a right to a no adverse inference instruction — to those specific circumstances. App. 18a-19a. In fact, *both Estelle and Mitchell involved an adverse inference that effectively shifted the government's burden of proving a disputed aggravating circumstance to the defendant. Accordingly, both cases involved government or court actions that penalized the defendant by exposing the defendant to greater punishment for exercising the Fifth Amendment privilege.* App. 21a-22a.

In Woodall's case, the state's burden of proving a disputed aggravating factor was not shifted to Woodall. The state neither sought an adverse inference nor opposed Woodall's request for a *Carter* instruction during the sentencing hearing. *Id.* And as the Kentucky Supreme Court quite reasonably explained, "[t]he no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. That is not the situation presented here." App. 261a.

As Judge Cook further points out, in the absence of disputed facts (as in Woodall's case), Woodall's silence would demonstrate only a lack of remorse. "Considering that *Mitchell* expressly exempted lack-of-remorse and acceptance-of-responsibility findings from its holding, 526 U.S. at 330, the state has good reason to believe that the Fifth Amendment did not require a *Carter* instruction here." App. 22a. Put another way, this Court expressly left open what the

Sixth Circuit says this Court has clearly established. That is a basic violation of AEDPA.

Simply put, *Carter*, *Estelle*, and *Mitchell* do not clearly establish a rule of law applicable to Woodall's case. None of the Fifth Amendment cases cited by the Sixth Circuit clearly establishes the right to a *Carter* instruction in the circumstances of Woodall's case. The Sixth Circuit's position extends the specific holdings in those cases and thereby creates a new rule of constitutional law. *See, United States v. Whitten*, 623 F.3d 125, 131-132 (2nd Cir.2010)(Livingston, J., joined by three other judges, dissenting from denial of *en banc* rehearing, noting that applying *Carter v. Kentucky* to the penalty phase of jury trial was new principle of constitutional law); *Edwards v. Roper*, 688 F.3d 449, 461 (8th Cir.2012)(assuming for the sake of argument that *Mitchell*, *Carter*, and *Estelle*, required a *Carter* instruction in the penalty phase, but finding denial of the instruction was harmless).

Mitchell has divided courts across the country in terms of drawing adverse inferences to increase the defendant's sentence. The case law of sister circuits breaks down into two broad groups: those cases that expand *Mitchell's* underlying principle to related but ultimately different legal questions, and those cases that take *Mitchell's*' limitation at face value and restrict it to its express rule of decision.[4] *Id., at* *8.

---

[4]Cases that favor an expansive view of *Mitchell* include: *United States v. Caro*, 597 F.3d 608, 629 (4th Cir.2010)(collecting conflicting cases on *Mitchell's* applicability to the nonstatutory sentencing factor of remorse); *United States v. Roman*, 371 F.Supp.2d 36, 50 (D.P.R.2005)(dealing with lack of remorse as an aggravator); and *United States v. Cooper*, 91 F.Supp.2d 90, 112-13

(D.D.C.2000)(noting defendant's failure to express remorse would encroach on defendant's right to remain silent).

Cases that favor a narrow application of *Mitchell* include: *Burr v. Pollard*, 546 F.3d 828 (7th Cir.2008) (holding that silence can be consistent not only with the exercise of one's Fifth Amendment right, but also with a lack of remorse);and *United States v. Ronquillo*, 508 F.3d 744, 749 (5th Cir.2007)(*Mitchell* inapplicable because defendant admitted all pertinent facts of the offenses). Additionally, three sister circuits have balked at and expressed apparent skepticism toward expanding *Mitchell's* no adverse inference rule beyond its clear holding: *United States v. Seward*, 583 F.3d 1045, 1048-49 (8th Cir.2009)(held that sentencing court could hold defendant's false denial against him); *Lee v. Crouse*, 451 F.3d 598, 605-06 (10th Cir.2006)(Supreme Court has not answered whether an adverse inference can be drawn at sentencing from a defendant's refusal to submit to psychological evaluation when that refusal does not relate to the facts of the crime);and *United States v. Romero-Rendon*, 220 F.3d 1159, 1163 n. 4 (9th Cir.2000)(use of presentence report to increase defendant's sentence did not violate *Mitchell*). Both the express language and the majority of circuits favor a narrow interpretation of *Mitchell*.

The Sixth Circuit has previously addressed *Mitchell* on three separate occasions: *Ketchings v. Jackson*, 365 F.3d 509 (6th Cir.2004)(Fifth Amendment rights violated where defendant refused to admit guilt in sentencing hearing and judge held it against him); *United States v. Kennedy*, 499 F.3d 547 (6th Cir.2007)(District Court did not violate Fifth Amendment by taking account of defendant's unwillingness to complete a psychosexual evaluation); and in this case, *Woodall v. Simpson*, 685 F.3d 574 (6th Cir.2010). The majority in *Woodall* reached its conclusion as to the necessity of a *Carter* instruction by making an "intermediate holding" on the scope of *Mitchell*, that is the no adverse inference rule warranted a prophylactic instruction in order to protect the right. *Miller v. Lafler*, 2012 WL 5519677 (6th Cir.Nov. 14, 2012)(unpublished), at *8.

This Court need not, of course, decide the correct interpretation of *Mitchell* for purposes of this case. It is enough that this Court has not clearly established whether a no adverse inference instruction was required; and that fairminded jurists can and do disagree on the applicable scope of *Mitchell*.

II. The Sixth Circuit improperly converted the *Brecht v. Abrahamson* "substantial and injurious effect" harmless error standard into a "possible-harm" standard.

The Sixth Circuit compounded its failure to abide by AEDPA by finding that the alleged error was not harmless. As pointed out by Judge Cook;

> "[T]he majority compounds its error by engaging in a form of *possible*-harm review that verges on a presumption of prejudice. This leniency appears both in its emphasis on dicta opining about the likelihood that juries draw adverse inferences, and its ultimate finding of a 'very real risk' of prejudice. Alas, the correct harmless-error standard does not permit such speculation, and neither does the undisputed evidence of this heinous crime."

App. 24a.

The Sixth Circuit uses pure conjecture to establish grave doubt and ignores the evidence as a whole including overwhelming evidence of Woodall's guilt of

the heinous crimes and evidence that Woodall lacked remorse for the crimes. Instead, the Sixth Circuit erroneously based its ruling upon the possibility that the jury "may" have sentenced Woodall to death because he didn't testify. Specifically, the Sixth Circuit stated, "Because we cannot know what led the jury to make the decision it did, and because the jury may well have based its decision [to sentence Woodall to death] on Woodall's failure to testify, we cannot conclude that this is a case of 'harmless error.'" App. 11a. Under the Sixth Circuit's standard, no error will ever be harmless because one can never know what led a jury to its decision and it is always possible that a jury based its decision on the alleged error in question. But that is not the standard under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

In *Brecht*, at 637, this Court adopted the following standard for harmless error review in habeas cases: whether the constitutional error had "substantial and injurious effect or influence in determining the jury's verdict." *Id.*, *citing Kotteakos v. United States*, 328 U.S. 750 (1946). The harmless error standard adopted in *Brecht* continues to apply to all habeas cases even after enactment of the AEDPA. *Fry v. Pliler*, 127 S.Ct. 2321 (2007).

This standard "protects the State's sovereign interest in punishing offenders and 'good-faith attempts to honor constitutional rights,' while ensuring that the extraordinary remedy of habeas corpus is available to those 'whom society has grievously wronged[.]'" *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (Citations omitted). *Calderon* further states:

> The social costs of retrial or resentencing are significant . . .[t]he State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error. *Brecht, supra*, at 637, 113 S.Ct. 1710.

Id.

In *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995), this Court recognized that the rare case might sometimes arise where the record is so evenly balanced that a conscientious judge is in "grave doubt" as to the harmlessness of an error. Recognizing that the circumstance of "grave doubt" is "unusual," this Court stated, "Normally a record review will permit a judge to make up his or her mind about the matter. And indeed a judge has an obligation to do so." *Id.*, at 435.

As pointed out by Judge Cook, "review of the record here leaves little room for doubt, let alone grave doubt. App. 27a. The state presented eleven witnesses and the defense fourteen. The sentencing jury heard undisputed evidence of the abduction, rape, maiming, and drowning of the victim; Woodall admitted as much by virtue of his guilty plea. Forensic evidence corroborated these facts. *Id.* "On the issue of remorse, the jury heard independent testimony from petitioner's mother that, shortly after the murder, petitioner came to her house, sat in a recliner, and watched television as if nothing had happened." *Id.* Petitioner even benefitted from a jury instruction he did not deserve, which told jurors to presume his innocence of the

aggravating factors he had admitted, unless the state presented proof beyond a reasonable doubt. *Id.* *See Delo v. Lashley*, 507 U.S. 272, 278-279 (1993)(an instruction is constitutionally required only when there is a "genuine danger" that the jury will convict based on something other than the State's lawful evidence. Once the defendant has been convicted, the presumption of innocence disappears).

In contrast, the jury heard nothing about Woodall's silence from the state or from the trial court. Despite this, the Sixth Circuit assumes "a very real risk" that his silence "had substantial and injurious effect or influence" on the verdict. As Judge Cook aptly asked in her dissent, "why would it?" App. 27a-28a.

In light of the record as a whole, the fact that Woodall did not get a no adverse inference instruction had no "substantial and injurious effect or influence in determining the jury's verdict." The Sixth Circuit failed to consider the record as a whole and did not give enough weight to the aggravating circumstances. *Cf. Bobby v. Van Hook*, 130 S.Ct. 13, 20 (2009). Instead, the Sixth Circuit erroneously based its ruling upon the possibility that the jury "may well have based its decision [to sentence Woodall to death] on Woodall's failure to testify." Woodall received the death penalty based upon what he did, not based upon the fact that he did not testify.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* should be granted and this Court should reverse the judgment of the Sixth Circuit.

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342
susan.lenz.ag.ky.gov

* Counsel of Record

APPENDIX

RECORD
AND
BRIEFS

12-794

Supreme Court, U.S.
FILED
DEC 26 2012
OFFICE OF THE CLERK

No. 12-____

Supreme Court of the United States

RANDY WHITE, WARDEN,
Petitioner,

v.

ROBERT KEITH WOODALL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Library of Congress
Law Library

APPENDIX CONTENTS

1. Opinion, U.S. Court of Appeals for the Sixth Circuit 1a-29a

2. Opinion, U.S. District Court 30a-173a

3. Magistrate Judge's Report and Recommendation, U.S. District Court 174a-258a

4. Opinion, Kentucky Supreme Court ... 259a-312a

5. Order, U.S. Court of Appeals for the Sixth Circuit 313a

6. Judgment, U.S. Court of Appeals for the Sixth Circuit 314a-315a

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT KEITH WOODALL,
Petitioner-Appellee/Cross-Appellant,

v. Nos. 09-5352/5406

THOMAS L. SIMPSON, Warden,
Respondent-Appellant/Cross-Appellee.

Appeals from the United States District Court
for the Western District of Kentucky at Paducah.
No. 06-00216—Thomas B. Russell, District Judge.

Argued: November 29, 2011

Decided and Filed: July 12, 2012

Before: MARTIN, COOK, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Susan Roncarti Lenz, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellant/Cross-Appellee. Laurence E. Komp, Manchester, Missouri, for Appellee/Cross-Appellant. **ON BRIEF:** Susan Roncarti

Lenz, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellant/Cross-Appellee. Laurence E. Komp, Manchester, Missouri, David H. Harshaw III, DEPARTMENT OF PUBLIC ADVOCACY, LaGrange, Kentucky for Appellee/Cross-Appellant.

MARTIN, J., delivered the opinion of the court, in which GRIFFIN, J., joined. COOK, J. (pp. 9–19), delivered a separate dissenting opinion.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Warden Thomas L. Simpson appeals from a district court judgment granting in part Robert Keith Woodall's petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Woodall is a Kentucky prisoner under sentence of death. Woodall cross-appeals the part of the judgment denying his remaining claims. Woodall pled guilty to capital murder, capital kidnapping, and first-degree rape. After a penalty trial, the trial court adopted the recommendation of the jury and sentenced Woodall to death on the murder conviction and life imprisonment for the remaining convictions. Woodall unsuccessfully appealed his sentence to the Kentucky Supreme Court and then filed a writ of habeas corpus in federal district court. The district court granted Woodall's petition for a writ of habeas corpus because the trial court denied him his Fifth Amendment right against self-incrimination and made a constitutional

error during jury selection. For the following reasons, the judgment of the district court is **AFFIRMED**.

I.

The facts of this case have been set forth by the Kentucky Supreme Court, *Woodall v. Commonwealth*, 63 S.W.3d 104, 114 (Ky. 2001), and need not be restated in detail. The victim was a sixteen-year-old female. On January 25, 1997, the night of the murder, she left her family home between 7:30 p.m. and 8:00 p.m., heading to a nearby convenience store. When she had not returned home several hours later, her family contacted the police. The victim's unclothed body was found floating in a lake, about one-half mile from the convenience store. Her throat had been slashed twice and her windpipe was totally severed; officials determined the actual cause of death to be drowning.

Woodall pled guilty to capital murder, capital kidnaping, and first-degree rape. At the penalty trial, Woodall cross-examined each of Kentucky's eleven witnesses and called fourteen of his own witnesses who testified about Woodall's life and upbringing. Woodall did not testify and requested that the trial judge instruct the jury that it should not draw any adverse inference from his decision not to testify. The trial judge concluded that Woodall was not entitled to the requested instruction, determining that, by entering a guilty plea, Woodall had waived his right to be free from self-incrimination. The jury recommended that Woodall be sentenced to death for the murder of the victim. The jury recommended that Woodall be

punished to two consecutive life sentences for the kidnaping and rape. The trial court adopted these recommendations.

On direct appeal, the Kentucky Supreme Court affirmed Woodall's convictions and sentences, with two justices dissenting. *Id.* at 134-35. Woodall filed a motion forrelief from judgment and a motion to vacate his sentence. The trial court denied both motions and the Kentucky Supreme Court affirmed those decisions. *Woodall v. Commonwealth*, No. 2003-SC-000475-MR, 2005 WL 3131603 (Ky. Nov. 23, 2005);*Woodall v. Commonwealth*, No. 2004-SC-0931-MR, 2005 WL 2674989 (Ky. Oct. 20, 2005).

In 2006, Woodall filed his section 2254 petition in federal court. The district court granted habeas relief for two of Woodall's thirty claimed grounds for relief; the court denied Woodall's remaining claims as meritless. Specifically, the district court granted Woodall's petition for habeas on his claim that the trial court violated his Fifth Amendment right against self-incrimination by failing to instruct the jury to draw no adverse inference from Woodall's decision not to testify, despite Woodall's request for such an instruction. The district court also found that the trial court violated Woodall's Fifth, Eighth, and Fourteenth Amendment rights during jury selection when the trialcourt allowed Kentucky to use a peremptory challenge to strike an African-American member of the jury without holding a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). The warden appeals both of these decisions. Woodall appeals the district court's

denial of his claim that the trial court improperly instructed the jury that they had to find any mitigating circumstances unanimously, and the district court's denial of his motion for the appointment of a mental retardation expert. Because the failure to instruct the jury that it could not draw an adverse inference from Woodall's decision not to testify was a violation of Woodall's Fifth Amendment rights, and because we are in "grave doubt as to the harmlessness" of this violation's impact on the jury's decision to sentence Woodall to death, *see O'Neal v. McAninch*, 513 U.S. 432, 445 (1995), we affirm the district court's grant of the writ of habeas on this basis and do not reach the other questions presented in this appeal.

II.

When considering a petition for a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996, this Court may not grant the writ unless it finds that the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d); *see also Ruelas v. Wolfenbarger*, 580 F.3d 403, 408 (6th Cir. 2009). Under the "contrary to" clause, a federal habeas court may grant the writ "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on materially indistinguishable facts." *Boykin v. Webb*, 541 F.3d 638, 642 (6th Cir. 2008) (citing *Williams v.*

Taylor, 529 U.S. 362, 412-13 (2000)). Under the "unreasonable application" clause, "a federal habeas court may grant the writ if the state court identifies the correct legal principle from the Supreme Court's decisions but unreasonably applie[d that principle to] the petitioner's case." *Id.*

The warden challenges the district court's grant of habeas corpus based on the district court's conclusion that the state courts unreasonably applied clearly established federal law. Woodall's principal argument is that the state court violated his Fifth Amendment right against self-incrimination when it refused to give a requested jury instruction that the jurors draw no adverse inference from his decision not to testify.

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). The Supreme Court has concluded that the Fifth Amendment requires a trial judge to give a "no adverse inference" instruction when requested by a defendant during the guilt phase of a trial. *See Carter v. Kentucky*, 450 U.S. 288, 303 (1981) ("No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum."). In *Estelle v. Smith*, the Supreme Court held that a defendant's entitlement to the Fifth Amendment's protection against self-

incrimination extends from the guilt phase to the penalty phase of a bifurcated capital trial. 451 U.S. 454, 462-63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."). More recently, in *Mitchell v. United States*, the Supreme Court held that the "rule against negative inferences at a criminal trial appl[ies] with equal force at sentencing," even where a defendant has pled guilty. 526 U.S. 314, 329 (1999); *id.* at 326 ("Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony.").

We are faced with the question of whether Woodall has a clearly established constitutional right to a requested "no adverse inference" instruction during the penalty phase of a capital trial where he declined to testify. "The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights." *Id.* at 330. Woodall's Fifth Amendment rights survived his guilty plea, *id.* at 326, and he was entitled to receive a "no adverse inference" instruction once he requested it. *Cf. Finney v. Rothgerber*, 751 F.2d 858, 863-64 (6th Cir. 1985) (finding that the "due process clause requires a trial court, if requested, to instruct the jury during the enhancement portion of a bifurcated trial of one charged as a persistent felony

offender that no adverse inference may be drawn from the defendant's failure to testify").

We agree with the district court that reading *Carter*, *Estelle*, and *Mitchell* together, the only reasonable conclusion is that the trial court violated Woodall's Fifth Amendment rights by refusing to give a requested "no adverse inference" instruction. The Kentucky Supreme Court's denial of this constitutional claim was an unreasonable application of *Carter*, *Estelle*, and *Mitchell*. *See Williams*, 529 U.S. at 407 ("[A] state-court decision [is] an unreasonable application of [the Supreme] Court's precedent if the state court . . . unreasonably refuses to extend [a legal] principle to a new context where it should apply."); *Mason v. Mitchell*, 543 F.3d 772, 772 (6th Cir. 2008) ("Clearly established law . . . encompasses more than just bright-line rules laid down by the Supreme Court. It also clearly includes legal principles and standards enunciated in the Court's decisions." (alterations and internal quotation marks omitted)). The district court held that a capital defendant has a Fifth Amendment right to a "no adverse inference" instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement. We agree. "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Estelle*, 451 U.S. at 463. At stake in the penalty phase of a capital trial such as Woodall's is not only what specific punishment the defendant will receive, but whether he will be put to death. The due process clause requires that a trial court, if requested

by the defendant, instruct the jury during the penalty phase of a capital trial that no adverse inference may be drawn from a defendant's decision not to testify.

The warden argues that any error resulting from the district court's failure to give a "no adverse inference" instruction was harmless because it did not have a substantial and injurious effect or influence on the sentence of this case. For purposes of federal habeas corpus review, a constitutional error that implicates trial procedures is considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted); *Doan v. Carter*, 548 F.3d 449, 459 (6th Cir. 2008); *see also Stewart v. Erwin*, 503 F.3d 488, 501 n.5 (6th Cir. 2007) (applying the harmless error standard to constitutional errors in sentencing). "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637. To determine the effect of an error, the court must determine "whether the [outcome that was] actually rendered in this trial was surely unattributable to that error." *Doan*, 548 F.3d at 459 (internal quotation marks omitted). The Supreme Court has observed that "it is arguable that a refusal to give [a 'no adverse inference' instruction] can never be harmless." *Carter*, 450 U.S. at 304 (declining to reach the question because it was not then presented and had not been before the state court); *see also Lakeside v. Oregon*, 435 U.S. 333, 340 & n.10 (1978)

(discussing the likelihood that a jury will draw an adverse inference from a defendant's decision not to testify). "The Supreme Court has emphasized . . . that when a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." *Erwin*, 503 F.3d at 501 (internal quotation marks omitted). "[G]rave doubt" means "that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435; *see also id.* at 437-38 ("[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.").

The warden argues that any error in the court's failure to instruct the jury was harmless because of the overwhelming evidence of Woodall's guilt presented during the penalty phase and the overwhelming evidence of the heinousness of the crimes, and because Woodall admitted the statutory aggravators necessary to impose the death penalty. If it were the case that a finding of the existence of statutory aggravators compels the imposition of the death penalty, then perhaps the trial court's error would have been "harmless." But the finding of the aggravating circumstances did not compel the jury to recommend a death sentence: the jury could have rejected the death penalty even if it found the existence of aggravating circumstances beyond a reasonable doubt. *See Skaggs v. Parker*, 235 F.3d 261, 271 (6th Cir. 2000) (describing

the variety of mitigating circumstances that a jury can consider during a penalty phase under Kentucky law). Because we cannot know what led the jury to make the decision that it did, and because the jury may well have based its decision on Woodall's failure to testify, we cannot conclude that this is a case of "harmless error." *See Carter*, 450 U.S. at 304 (noting that it is "arguable" that refusing to give a "no adverse inference instruction" is "never" harmless); *Ullman v. United States*, 350 U.S. 422, 426 (1956) ("Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."); *see also Bruno v. United States*, 308 U.S. 287, 294 (1939). Indeed, the trial court itself appears to have drawn an adverse inference from Woodall's decision not to testify: in denying the requested instruction, the trial court stated that it was "aware of no case law that precludes the jury from considering the defendant's lack of explanation of remorse or explanation of the crime or anything else once guilt has been adjudged in sentencing." The trial court's own inferences illustrate our concern. Given our grave doubt that the jury's recommendation was not influenced by adverse inferences drawn from Woodall's decision not to testify, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *O'Neal*, 513 U.S. at 437 (internal quotation marks omitted). Under these circumstances, "it is impossible to conclude that the substantial rights were not affected." *Id.* at 437-38

(internal quotation marks omitted). Therefore, under *O'Neal*, we treat the error as harmful and grant Woodall's petition on this basis. *See Jensen v. Romanowski*, 590 F.3d 373, 381 (6th Cir. 2009) (applying *O'Neal* where the court could not "be certain that the error had 'no or small effect' on the jury's verdict" and had "'grave doubt' that the error was harmless"). Because the violation of Woodall's substantial rights requires issuance of the writ, we do not address—or pass judgment upon—the other claims at issue in this appeal.

III.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**. We **REMAND** with instructions to conditionally grant the writ unless the State of Kentucky elects to initiate resentencing proceedings within 180 days of the district court's order.

DISSENT

COOK, Circuit Judge, dissenting. In granting habeas relief, today's majority finds a prejudicial violation of clearly established federal law in the trial court's failure to provide a *Carter* instruction to the sentencing jury after the defendant pleaded guilty to the relevant criminal conduct. Yet, the Kentucky Supreme Court carefully considered petitioner's Fifth Amendment claim in light of the same Supreme Court

decisions—*Carter*, *Estelle*, and *Mitchell*—and rightly found that none addresses the circumstances presented here. The majority disregards that analysis, finds a violation of clearly established law, and ultimately resolves the matter in favor of speculation, worrying that the jury may have punished petitioner for failing to testify. This, despite a mountain of undisputed evidence that petitioner abducted, raped, maimed, and drowned a sixteen-year-old high school student. The court's judgment defies AEDPA deference and the Supreme Court's harmless-error teachings. I respectfully dissent.

I.

Petitioner argues that the Fifth Amendment required the trial court to give a *Carter* instruction to his sentencing jury—i.e., to instruct the sentencing jury to draw no adverse inference from his decision not to testify at the sentencing hearing. Because the appeal arises on habeas review, it turns on whether the Kentucky Supreme Court "unreasonabl[y] appli[ed] . . . clearly established [f]ederal law, as determined by the Supreme Court of the United States," in rejecting petitioner's claim. 28 U.S.C. § 2254(d)(1). The majority answers in the affirmative, citing three Supreme Court decisions: *Carter v. Kentucky*, 450 U.S. 288 (1981); *Estelle v. Smith*, 451 U.S. 454 (1981); and *Mitchell v. United States*, 526 U.S. 314 (1999). The majority overlooks, however, the Kentucky Supreme Court's careful and correct distinguishing of those cases, both on their facts and the legal principles at stake. Kentucky's highest court reasoned as follows:

Woodall argues that he was denied due process, his right not to testify and a reliable sentence determination when the trial judge refused to instruct the jury to draw no adverse inference from the decision of Woodall not to testify during the penalty trial. Woodall pled guilty to all of the charged crimes as well as the aggravating circumstances. The no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. That is not the situation presented here. The instruction contemplated by *Carter v. Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), could not have changed the outcome of a guilty determination that the defendant acknowledged by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.

There is no error in this respect. Any possible error would be nonprejudicial because the defendant admitted the crimes and the evidence of guilt is overwhelming. Woodall claims that *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), extended Fifth Amendment protection and thus the *Carter, supra*, rule to the penalty phase of a trial. *Estelle, supra*, is not a jury

instruction case, unlike *Carter*. *Estelle* does not cite to *Carter* or indicate that *Carter* has been extended. The factual situation in *Estelle* is different from that presented in this case because it involved the use of an out-of-court statement the defendant made to a government expert. The statement in that case was in regard to a psychological examination by the government prosecutors which was used against the defendant without warning in the penalty trial. Neither *Carter* nor *Estelle* involved a guilty plea. Here, Woodall admitted guilt to all charges and did not contest the facts. He was not compelled to testify so there were no words that could be used against him so as to implicate the Fifth Amendment privilege as in *Estelle*.

Woodall contends that *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999), permits a guilty plea which does not waive the privilege against self-incrimination at the sentencing phase. *Mitchell, supra*, does not apply here. In *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine within 1000 feet of a school or playground. She reserved the right to contest the amount of the cocaine at the

> penalty phase. The amount of the cocaine would determine the range of penalties. She only admitted that she had done "some of" the conduct charged. She did not testify. Three other codefendants did testify as to the amount of cocaine she had sold. Ultimately, the U.S. Supreme Court ruled that it would not permit a negative inference to be drawn about her guilt with regard to the factual determination respecting the circumstances and details of the crime. Here, Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes.

Woodall v. Commonwealth, 63 S.W.3d 104, 115 (Ky. 2001), *cert. denied*, 123 S. Ct. 145 (2002). Only one Justice dissented from this portion of the court's judgment. *See id.* at 134 (Stumbo, J., dissenting), 135 (Keller, J., dissenting on other grounds) (deeming any error in this regard harmless, "because the defendant not only pled guilty, but admitted to the aggravating circumstances").

Because the Kentucky Supreme Court applied the correct legal standards, and the facts of this case differ materially from the circumstances of *Carter*, *Estelle*, and *Mitchell*, AEDPA strictly limits our review to whether the Kentucky Supreme Court *unreasonably* applied rules *clearly established* by those cases. 28 U.S.C. § 2254(d)(1). "[C]learly established," in this context, confines our inquiry to "the holdings, as

opposed to the dicta, of [U.S. Supreme Court] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). And "[u]nreasonable application" means "objectively unreasonable," not simply incorrect. *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (explaining that AEDPA deference requires more than clear error). Under this standard, a habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786–87 (2011). In other words, we may not grant habeas relief "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)); *accord Gagne v. Booker*, 680 F.3d 493, 512–14 (6th Cir. 2012) (*en banc* plurality opinion).

AEDPA deference requires careful inspection of the distinctions highlighted by the Kentucky Supreme Court. "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Harrington*, 131 S. Ct. at 786 (quoting *Yarborough*, 541 U.S. at 664); *see also Moses v. Payne*, 555 F.3d 742, 754 (9th Cir. 2009) ("[W]hen a Supreme Court decision does not 'squarely address[ ] the issue in th[e] case' or establish a legal principle that 'clearly extend[s]' to a new context to the extent required by

the Supreme Court in these recent decisions, [*Wright v. Van Patten*, 552 U.S. 120, 125 (2008),] it cannot be said, under AEDPA, there is 'clearly established' Supreme Court precedent addressing the issue before us, and so we must defer to the state court's decision."). The majority does not suggest that any of its Fifth Amendment cases alone clearly established the trial court's obligation to give the no-adverse-inference instruction under the circumstances of this case. Rather, it reads *Carter*, *Estelle*, and *Mitchell* as protecting a defendant's Fifth Amendment privilege at all stages of criminal proceedings, regardless of whether the defendant disputes any of the incriminating evidence.

Only *Carter* addresses the need for a prophylactic jury instruction to protect the Fifth Amendment privilege against self-incrimination. Noting the tendency of juries to infer guilt from a defendant's silence, *Carter* held that trial courts must provide a no-adverse-inference instruction during the guilt phase of a criminal trial upon request. 450 U.S. at 303. Yet, as the majority appears to recognize, *Carter* did not consider a defendant's entitlement to such an instruction at post-guilt stages of criminal proceedings or the effect of a defendant's guilty plea on that right—two variations relevant to this appeal. *See id.* at 289–90, 300–05.

Estelle and *Mitchell* speak more directly to these issues, generally recognizing that the Fifth Amendment privilege extends to the sentencing phase of criminal trials and that a generic guilty plea does

not waive this right. But importantly, neither case extended the *Carter* remedy—a right to a no-adverse-inference instruction—to those specific circumstances. *Estelle* involved a state's surprise use of defendant's pre-trial statements to establish a necessary aggravating factor (future dangerousness) for capital punishment. 451 U.S. at 462–63. The defendant made the statements at a court-ordered, pre-trial psychiatric evaluation without the benefit of *Miranda* warnings. The Fifth Amendment violation thus involved both the coercive nature of the interrogation procedure *and* the state's use of the defendant's unwitting pre-trial statements to establish a necessary penalty factor against him. *Id.* at 467–69 (vacating the death sentence). Similarly, *Mitchell* found a Fifth Amendment violation where the sentencing judge admitted to drawing an adverse inference regarding a disputed aggravating factor—the amount of drugs involved—from the defendant's failure to rebut the government's sentencing-hearing witnesses. Although the defendant previously pleaded guilty to a drug-conspiracy crime, she disputed the government's drug-quantity position, which carried a heavier penalty. Because her guilty plea did not eliminate the possibility of additional punishment, the *Mitchell* Court found that the Fifth Amendment precluded the trial court from drawing an adverse inference from her silence. 526 U.S at 330.

Admittedly, *Estelle* and *Mitchell* discuss the Fifth Amendment privilege in expansive terms. From *Estelle*:

> The Fifth Amendment privilege is as broad as the mischief against which it seeks to guard, and the privilege is fulfilled only when a criminal defendant is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.

451 U.S. at 467–68 (internal citations and quotation marks omitted). *Mitchell* goes further, with the following statements:

> Treating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants. . . .
>
> . . . .
>
> Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony. . . .
>
> . . . .
>
> The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing. Without question, the stakes are high: Here, the inference drawn by the District Court from petitioner's silence may have resulted in decades of added imprisonment. The Government often has a motive to demand a severe sentence, so the central purpose of the privilege—to

> protect a defendant from being the unwilling instrument of his or her own condemnation—remains of vital importance.
>
> . . . .
>
> . . . The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege. . . .

526 U.S. at 324, 326, 329, 330. But these statements must be read in context. *Estelle* involved the *actual use* of a defendant's coerced statements against him. Both *Estelle* and *Mitchell* presented an adverse inference that effectively shifted the government's burden of proving a disputed aggravating circumstance to the defendant. Accordingly, both cases involved government or court actions that penalized the defendant—by exposing the defendant to greater punishment—for exercising the Fifth Amendment privilege.

This case did not. The state did not coerce petitioner to make any statement. Nor did it seek an adverse inference or oppose petitioner's request for a *Carter* instruction during the sentencing hearing. And, importantly, the state did not shift its burden of proving a disputed aggravating factor to petitioner. The state's current opposition to habeas relief reflects the unique circumstances of Woodall's sentencing hearing—namely, that his guilty plea admitted both the relevant criminal conduct and the required aggravating circumstances for the death penalty (rape and kidnapping), and that his sentencing position did not dispute any of these facts. Now that Woodall has been sentenced, the state has a legitimate interest in opposing Woodall's stance on the *Carter* instruction. In the absence of disputed facts, Woodall's silence would demonstrate only a lack of remorse; a *Carter* instruction would restrict the jury from considering that relevant fact. Considering that *Mitchell* expressly exempted lack-of-remorse and acceptance-of-responsibility findings from its holding, 526 U.S. at 330, the state has good reason to believe that the Fifth Amendment did not require the *Carter* instruction here.

In sum, the punitive element so critical in *Estelle* and *Mitchell*—the state's use of the defendant's silence to impose greater punishment—is wholly absent. *Cf. Lakeside v. Oregon*, 435 U.S. 333, 344 (1978) (explaining that "the government may not add unnecessarily to the risk taken by a defendant who stands mute"). And none of the Fifth Amendment cases cited by the majority clearly establishes the right to a

Carter instruction in these circumstances.[1] The majority's position extends the rules of those cases, and fairminded jurists may differ in the application of those rules to the facts in this case.

Six Justices of the Kentucky Supreme Court, in fact, did so. The majority improperly dismisses their judgment (as well as the Report and Recommendation of the federal magistrate judge) without so much as a nod to the standard that the judgment be beyond the purview of fairminded jurists. This stance not only flouts the AEDPA standard, but also undermines the animating purposes of AEDPA deference: comity, finality, and federalism. *See, e.g., Woodford v. Garceau*, 538 U.S. 202, 206 (2003).

Reasonable though the majority's Fifth Amendment analysis may be, AEDPA deference precludes us from substituting our reasonable judgment for that of the state's highest court. In my view, the Kentucky Supreme Court reasonably applied federal law.

---

[1] The majority's passing mention of *Finney v. Rothgerber*, 751 F.2d 858, 864 (6th Cir. 1985) does not fit this bill for a number of reasons. First, *Finney* is not a Supreme Court decision and therefore not "clearly established" federal law under AEDPA. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412. Second, the decision predates the enactment of AEDPA, and thus did not assess the state-court judgments under its deferential "unreasonable application of . . . clearly established [f]ederal law" standard. And third, the court found the Fifth Amendment violation harmless under the demanding, pre-*Brecht*, *Chapman* rule, noting that undisputed evidence satisfied "all of the statutory requirements for guilt as a persistent felony offender." *Finney*, 751 F.2d at 864–65.

II.

The majority compounds its error by engaging in a form of *possible*-harm review that verges on a presumption of prejudice. This leniency appears both in its emphasis on dicta opining about the likelihood that juries draw adverse inferences, and in its ultimate finding of a "very real risk" of prejudice. Alas, the correct harmless-error standard does not permit such speculation, and neither does the undisputed evidence of this heinous crime.

As foreshadowing of the harmless-error review to come, the court twice emphasizes a statement in *Carter* that "it is arguable that a refusal to give an instruction similar to the one that was requested here can never be harmless." 450 U.S. at 304. Yet because *Carter* declined to decide the issue, our decision in *Finney v. Rothgerber* requires us to review for harmless error. 751 F.2d 858, 864 (6th Cir. 1985) (reviewing for harmless error the state court's failure to give a *Carter* instruction during the persistent-felony-offender penalty phase of a criminal trial); *see also Chapman v. California*, 386 U.S. 18, 22 (1967) (subjecting most constitutional claims to harmless-error review, including a prosecutor's comment about the defendant's exercise of the Fifth Amendment privilege); *Hunter v. Clark*, 934 F.2d 856, 859–60 (7th Cir. 1991) (en banc) (justifying application of harmless-error review to a *Carter* claim by noting the more severe infraction on the Fifth Amendment privilege resolved by harmless-error review in *Chapman*); *Richardson v. Lucas*, 741 F.2d

753, 755 (5th Cir. 1984) (same).[2] The majority ostensibly concedes this point.

It then begins its harmless-error review on the right track, citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993) for the standard applicable to habeas cases. From *Brecht*, the majority correctly defines harmful error as one "ha[ving] substantial and injurious effect or influence in determining the jury's verdict." *Id.* at

---

[2] *Bruno v. United States*, cited by the majority, does not counsel otherwise, both because it involved a statutory privilege and statutory harmless-error review, and because it predates *Chapman's* mandate of harmless-error review for most constitutional errors. *Bruno v. United States*, 308 U.S. 287, 293–94 (1939) (construing federal statute guaranteeing a defendant's right to testify or remain silent to require a preemptive, no-adverse-inference instruction, and finding harmful the denial of that right).

During oral argument, petitioner's counsel briefly suggested that the denial of a *Carter* instruction here constituted a "structural" error exempt from harmless-error review. *See generally Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (differentiating between "trial error[s]" subject to harmless-error review and "structural defects" presumed prejudicial). But counsel did not make that argument in petitioner's appellate brief (see Appellee Br. at 32–37), and therefore offers no explanation for the harmless-error review in *Chapman*—a case involving a more severe Fifth Amendment violation—or our decision in *Finney*. More recent articulations of what constitutes "structural error" do not disturb these precedents. *See, e.g., Neder v. United States*, 527 U.S. 1, 8 (1999) (reiterating that "most constitutional errors can be harmless" and describing "structural errors" as "defect[s] affecting the framework within which the trial proceeds" that "deprive defendants of basic protections" so as to undermine the reliability of the trial's "determination of guilt or innocence" (internal citations and quotation marks omitted)).

637 (citation omitted). But then the majority offers conflicting statements from *Brecht* and *Doan v. Carter*, 548 F.3d 449, 459 (6th Cir. 2008), first saying that the petitioner must establish "actual prejudice," and then suggesting that harmless error refers only to outcomes "surely unattributable to [the alleged] error." The majority's conclusion—that the absence of a *Carter* instruction *may* have influenced the jury—reveals that it tips the scales in favor of the habeas petitioner.

As the majority appears to acknowledge, *O'Neal v. McAninch* clarified the habeas harmless-error standard announced in *Brecht*. *O'Neal v. McAninch*, 513 U.S. 432 (1995); *see also Fry v. Pliler*, 551 U.S. 112, 121 n.3 (2007) (plurality). *O'Neal* explained that *Brecht's* "actual prejudice" language did not burden the habeas petitioner to produce evidence of prejudice. 513 U.S. at 436–39. It did, however, acknowledge the more lenient harmless-error standard applicable to habeas cases, as compared to direct appeals. *O'Neal*, 513 U.S. at 438 (differentiating the *Brecht* standard from the "stricter" *Chapman* standard); *see also Fry*, 551 U.S. at 119–20 (explaining that the *Brecht/Chapman* harmless-error dichotomy survived AEDPA's enactment). After *O'Neal*, "grave doubt" became the harmfulness threshold for habeas harmless-error review. *O'Neal*, 513 U.S. at 435. "Grave doubt" refers to situations where, after reviewing the record, "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error." *Id.; see also id.* at 436–37 ("[W]e think it conceptually clearer for the judge to ask directly, 'Do I, the judge, think that the

error substantially influenced the jury's decision?' than for the judge to try to put the same question in terms of proof burdens (*e.g.*, 'Do I believe the party has borne its burden of showing . . .?').").

Our cases follow this guidance. *E.g.*, *Ferensic v. Birkett*, 501 F.3d 469, 480–81 (6th Cir. 2007); *Caldwell v. Bell*, 288 F.3d 838, 842–43 (6th Cir. 2002). *Doan* did not, though it still found harmless error under a stricter standard. *Doan*, 548 F.3d at 459 (neglecting to cite *O'Neal*, and instead applying the "surely unattributable" standard from *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), a case applying *Chapman* harmless-error review on direct appeal). We must follow the "grave doubt" method advanced in *O'Neal*.

With this standard, review of the record here leaves little room for doubt, let alone grave doubt. The state presented eleven witnesses and the defense fourteen. The sentencing jury heard undisputed evidence of the abduction, rape, maiming, and drowning of the victim; petitioner admitted as much by virtue of his guilty plea. Undisputed forensic evidence corroborated these facts. On the issue of remorse, the jury heard independent testimony from petitioner's mother that, shortly after the murder, petitioner came to her house, sat in a recliner, and watched television as if nothing had happened. Petitioner even benefitted from a jury instruction (No. 1) he did not deserve, which told the jurors to presume his *innocence* of the aggravating factors he admitted, unless the state presented proof beyond a reasonable doubt.

Conversely, the jury heard *nothing* about petitioner's silence from the state or from the trial court, and we have no way of knowing whether it even noticed. Nevertheless, the majority assumes "a very real risk" that his silence "had substantial and injurious effect or influence" on the verdict. Faced with this overwhelming and undisputed evidence, why would it?

The majority faults the trial judge for drawing an adverse inference (the *Mitchell* mistake), but the judge did nothing more than issue a legal ruling, stating that he *knew of no authority* precluding a sentencing jury from considering a defendant's lack of remorse. And even if he did draw an adverse inference, the jury who made the sentencing recommendation did not hear this statement. Petitioner correctly notes that, under Kentucky law, the sentencing jury retains the discretion to recommend a life sentence, despite the presence of aggravating factors. Yet, that fact does not make it any more likely that Woodall's silence substantially affected the jury's verdict.

Notably absent from the majority's harmless-error analysis is any discussion of *Finney*, a case the majority cites as supporting its finding of a constitutional violation. *Finney* involved somewhat similar circumstances, in that the trial court refused to give a *Carter* instruction to the sentencing jury in a post-guilt, persistent-felony-offender hearing. There, despite finding a Fifth Amendment violation, we held that "[t]he overwhelming evidence of guilt as a persistent felony offender makes failure to give the

requested instruction harmless beyond a reasonable doubt as to that issue." *Finney*, 751 F.2d at 864–65 (noting that undisputed evidence established the statutory prerequisites for the sentencing enhancement). We did so, despite applying the stricter, pre-*Brecht*, *Chapman* standard, which required harmlessness "beyond a reasonable doubt." One can only wonder how the circumstances deemed harmless *beyond a reasonable doubt* in *Finney* somehow become harmful under the more lenient "substantial and injurious effect" standard of *Brecht*, or even leave "grave doubt" as to harmfulness under *O'Neal*.

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde v. California*, 494 U.S. 370, 380 (1990). The state expended significant resources to ensure a fair sentencing hearing for Woodall. The majority brushes that aside on supposition. Pure conjecture does not establish grave doubt. I harbor none and would deny the writ.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CIVIL ACTION NO. 5:06CV-P216-R

[CAPITAL CASE]

ROBERT KEITH WOODALL **PETITIONER**

v.

THOMAS L. SIMPSON **RESPONDENT**

I. INTRODUCTION

This matter is before the Court on Robert Keith Woodall's petition for a writ of habeas corpus under 28 U.S.C. § 2254 (DN 6). Woodall pleaded guilty to the charges of kidnapping, raping, and murdering sixteen-year-old Sarah Hansen. However, he contested that the punishment of death should be imposed. A jury trial on the appropriate sentence was conducted. The jury sentenced Woodall to death for the murder and to life for the kidnapping and rape.

The crimes that Woodall admitted committing are revolting and despicable. There is no question that he planned to and did brutally and violently kidnap a young girl, savagely beat and rape her, cut her throat twice with a box cutter, drag her while still alive several hundred yards, and then throw her naked body into a freezing lake where she ultimately drowned. There is also no question that the victim and her

family deserve justice. However, ours is a system of law that is concerned with justice for both the victim and the accused. That system demands certain rights be afforded to Woodall regardless of the cruelty and gruesomeness of his crimes. The duty of this Court is to determine whether, as a matter of law, Woodall received a constitutionally sound sentencing hearing before he was condemned to death. Such emotional detachment may be difficult, but all agree it is "required." The Court has taken such time as needed to painstakingly perform such a review.

The Court has exhaustively reviewed the record below, the Magistrate Judge's Report and Recommendation, the parties' objections thereto, and the relevant case law. After doing so, the Court concludes that the requested writ should issue on claims one and two. The Court also finds that a certificate of appealability should issue with respect to claim five. On all other issues, the Court adopts the Magistrate Judge's Report and Recommendation, with modifications as discussed below.

II. FACTUAL FINDINGS

The facts underlying Woodall's sentence are fully recounted in the Kentucky Supreme Court's decision on direct appeal. *Woodall v. Commonwealth*, 63 S.W.3d 104 (Ky. 2001). This Court presumes the state court's findings of fact to be correct. *See* 28 U.S.C. § 2254(e)(1). The Kentucky Supreme Court recited the facts underlying Woodall's death sentence as follows:

The victim was a 16-year-old high school cheerleader, an honor student, a musician, a member of the National Honor Society and the Beta Club and a medalist in swimming and diving. On January 25, 1997, she had planned to watch a video with her boyfriend. She went to the local mini-mart to rent a movie, leaving her home between 7:30 p.m. and 8:00 p.m., never to be seen alive again by her family. At 10:42 p.m., two police officers were dispatched to search for the victim. Thereafter, they found the minivan that she had been driving in a ditch at Luzerne Lake, approximately 1.5 miles from the mini-mart. The officers followed a four to five hundred foot trail of blood on a gravel roadway from the van. The unclothed body of the victim was found floating in the water. Her throat had been slashed twice with each cut approximately 3.5 to 4 inches long. Her windpipe was totally severed. She actually died of drowning.

The police questioned Woodall when they learned that he had been in the mini-mart on Saturday night. He gave two conflicting statements about his activities on the night of the murder after he left work. The police observed that Woodall was wearing a brand of tennis shoe similar to the imprint on the pier next to

> where the body of the victim had been found. His fingerprints were on the van the victim was driving. Blood was found on his front door and muddy and wet clothing under his bed. Blood on his clothing and sweatshirt were consistent with the blood of the victim. The DNA on the vaginal swabs was consistent with his. His fingerprints were identified on the glass and door of the van as well as the interior doorjamb and handle. On March 18, 1997, the Muhlenberg County Grand Jury indicted him for murder, kidnapping and rape. One week later, the Commonwealth announced its intention to seek the death penalty. Venue for the prosecution was changed from Muhlenberg to Caldwell County because of massive publicity.

Woodall, 63 S.W. 3d at 114.

III. PROCEDURAL HISTORY

On April 10, 1998, Woodall pleaded guilty to all charges and asked for judicial sentencing. He later withdrew the judicial sentencing request, and a sentencing hearing before a jury commenced on July 14, 1998. The sentencing hearing lasted six days. The prosecution called eleven witnesses and the defense presented fourteen witnesses. Woodall did not testify. At the conclusion of the sentencing hearing, the jury sentenced Woodall to death for the murder of Sarah

Hansen. The jury found the aggravating circumstance to be first degree rape committed during the commission of a kidnapping and murder. The jury fixed Woodall's punishment for the kidnapping and rape at two consecutive life sentences. The trial court followed the jury's sentencing recommendations and entered the final judgment of conviction and sentence of death on September 4, 1998.

Woodall filed a timely direct appeal with the Kentucky Supreme Court. On direct appeal, Woodall raised twenty-eight assignments of error. Woodall's sentence and convictions were upheld by the Kentucky Supreme Court on August 23, 2001, and made final on January 17, 2002. Justice Stumbo filed a dissenting opinion in which Justice Keller joined in part. On October 7, 2002, the United States Supreme Court denied certiorari. *Woodall v. Kentucky*, 537 U.S. 835 (2002).

On December 3, 2002, Woodall filed a Motion to Vacate and Set Aside Sentence of Death under RCr 11.42. On February 6, 2003, Woodall filed his first amended motion to vacate and set aside sentence of death under RCr 11.42. On March 7, 2003, Woodall filed a second amendment to his RCr 11.42 motion along with a request for permission to amend. On April 22, 2003, the Caldwell Circuit Court denied Woodall's motion to amend and his motion for relief. Woodall appealed the denial of his RCr 11.42 motion to the Kentucky Supreme Court. The Kentucky Supreme Court affirmed the denial on November 23, 2005. *Woodall v. Commonwealth*, No. 2003-SC-475-MR, 2005

WL 3131603 (Ky. Nov. 23, 2005). On February 23, 2006, the Court denied a petition for rehearing. Woodall filed a petition for certiorari with the United States Supreme Court. On October 2, 2006, the Court denied the petition. *Woodall v. Kentucky*, --U.S.--, 127 S.Ct. 280, 168 L.Ed.2d 214 (2006).

On June 1, 2004, Woodall filed a "motion for relief from judgment and sentence from death pursuant to CR 60.02(f)." On October 4, 2004, the Caldwell Circuit Court entered an order denying Woodall's motion for relief pursuant to CR 60.02. The Kentucky Supreme Court affirmed this denial on October 20, 2005. *Woodall v. Commonwealth*, No. 2004-SC-0931-MR, 2005 WL 2674989 (Ky. Oct. 20, 2005). The Kentucky Supreme Court denied a petition for rehearing on February 23, 2006. Woodall filed a petition for certiorari with the United States Supreme Court. On October 2, 2006, the Court denied the petition. *Woodall v. Kentucky*, --U.S.--, 27 S.Ct. 266, 166 L.Ed.2d 206 (2006).

On December 28, 2006, Woodall filed this petition for writ of habeas corpus in the United States District Court, Western District of Kentucky. In his petition for a writ of habeas corpus, Woodall raises the following thirty points of error: 1) the trial court refused to give a no adverse inference instruction; 2) the trial court failed to conduct a *Batson* hearing; 3) the trial court incorrectly excused veniremen Bessie Hopson and Richard Thompson for cause; 4) the trial court failed to strike six other veniremen for cause; 5) the trial court failed to properly instruct the jury on mitigation; 6) the

verdict form was weighted in favor of death; 7) prosecutorial misconduct during closing arguments; 8) the trial court unduly restricted *voir dire* questioning; 9) the trial judge impermissibly considered Woodall's sex offender treatment report when it sentenced Woodall; 10) Woodall's guilty plea was involuntarily; 11) the trial judge incorrectly denied Woodall a continuance; 12) the trial judge improperly denied funding to conduct a positron emissions tomography ("PET") scan; 13) the trial judge erred in failing to hold a competency hearing; 14) the trial judge erred in not finding Woodall mentally retarded; 15) trial counsel were ineffective for failing to request a competency hearing; 16) trial counsel were ineffective for failing to raise mental retardation as an issue; 17) trial counsel were ineffective for forcing Woodall to plead guilty; 18) trial counsel were ineffective for failing to present additional mental health testimony in support of a third continuance; 19) trial counsel were ineffective for failing to present an insanity defense; 20) trial counsel were ineffective for failing to present a genetic defect defense; 21) trial counsel were ineffective for failing to pursue further neurological testing; 22-24) trial counsel were ineffective for failing to present enough mitigation evidence to convince the jury that Woodall did not deserve the death penalty; 25-26) a juror committed misconduct by consulting the Bible during deliberations; 27) the death penalty is a disproportionate punishment as applied to this case; 28) the trial judge impermissibly relied on non-statutory aggravators in sentencing Woodall; 29) Woodall is incompetent to be executed; and 30)

cumulative errors rendered Woodall's trial fundamentally unfair.

This Court referred Woodall's petition to the Magistrate Judge for a Report and Recommendation. On January 30, 2008, the Magistrate Judge issued a Report and Recommendation that Woodall's petition be denied. With the exception of claim number twenty-nine, Woodall objects to every conclusion reached by the Magistrate Judge.

IV. STANDARD OF REVIEW

When the parties to an action submit objections to the Magistrate Judge's Report and Recommendation, the district court reviews the record *de novo*. 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). Review in this case is governed by Chapter 153 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. Under the AEDPA,

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254.

The United States Supreme Court has interpreted the provisions regarding a state court decision that is "contrary to" or an "unreasonable application of" clearly established federal law. *See Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, the Court determined that under the "contrary to" clause, a federal habeas court may grant a writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the

state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Id.* at 405. Under this standard, an unreasonable application is an objectively unreasonable application of the federal law set forth in decisions of the United States Supreme Court. A state court's ruling violates the "unreasonable application" clause "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407. An unreasonable application can also occur where "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* Unreasonableness is an objective standard, and the fact that another court has applied the law in the same manner is not dispositive. *Id.* at 409-10. "Unreasonable" is distinct from "incorrect;" even if a state court incorrectly applies a rule of law, that error will not warrant habeas relief unless the application was objectively unreasonable. *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003). The Sixth Circuit has stated that "the district court could find the state court determinations unreasonable 'only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect,'" and its error "'would not be debatable among reasonable jurists.'" *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996)).

Under the AEDPA, "clearly established federal law" means "holdings, as opposed to the dicta of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. at 412. "'As is dictated by the statute, [reviewing courts] may not look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.'" *Smith v. Stegall*, 385 F.3d 993, 998 (6th Cir. 2004) (quoting *Doan v. Brigano*, 237 F.3d 722, 729 (6th Cir. 2001), abrogated on other grounds by *Wiggins v. Smith*, 539 U.S. 510 (2003)). Reviewing courts may consider such lower federal court decisions, however, to the extent that such decisions reflect review and interpretation of "'relevant Supreme Court case law to determine whether a legal principle or right had been clearly established by the Supreme Court case law.'" *Id.* (quoting *Hill v. Hofbauer*, 337 F.3d 706, 716 (6th Cir. 2003)). In this Circuit, reviewing courts are "also bound by any prior Sixth Circuit decisions concluding that federal law on a particular issue has been 'clearly established' by certain holdings of the Supreme Court." *Id.* (citing Rule 206(c)) of the Sixth Circuit Rules).

Even where the state court decision does not specifically cite to relevant federal case law, the deferential AEDPA review standard applies. *Early v. Packer*, 537 U.S. 3, 8 (2002) (holding that the state court is not required to cite United States Supreme Court cases, or even be aware of them, to be entitled to AEDPA deference, "so long as neither the reasoning nor the result of the state-court decision contradicts them"). However, the deferential standard of the

AEDPA does not apply where the state court has not adjudicated the merits of the particular claim. *Clinkscale v. Carter*, 375 F.3d 430, 436 (6th Cir. 2004) (citing *Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003) ("Where as here, the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply.") (citing *Wiggins v. Smith*, 539 U.S. at 537-38)). In that instance, the claim is reviewed *de novo*. *Id.*

To the extent that a habeas petitioner challenges the factual findings of the state court, *Id.*2254(e)(1) provides that "determination of a factual issue by a State court shall be presumed to be correct" and that "[t]he [petitioner] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

A state prisoner must exhaust his state remedies before bringing his claim in a federal habeas corpus proceeding. 28 U.S.C. § 2254(b) & (c)). A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on his or her claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). If the petitioner still has a remedy in the state courts in which the state court would have the opportunity to rule on the federal constitutional claims in petitioner's case, exhaustion has not occurred. *Rust v. Zent*, 17 F.3d at 160. At the current juncture, the Court sees no apparent exhaustion problems with the petition in this case and

does not engage in a *sua sponte* analysis of exhaustion where Respondent has failed to raise it.

Habeas petitioners face an additional hurdle before federal courts may review a question of federal law decided by a state court. As applied in the habeas context, the doctrine of procedural default prevents federal courts from reviewing claims that a state court has declined to address because of a petitioner's noncompliance with a state procedural requirement. In *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), the United States Supreme Court held that, for purposes of comity, a federal court may not consider "contentions of federal law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." Additionally, the Supreme Court held in *Coleman v. Thompson*, 501 U.S. 722, 749 (1991), that:

> [If a] state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

The Sixth Circuit has adopted a four-part test for determining whether a claim has been procedurally defaulted:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim . . . [Fourth,] the petitioner must demonstrate under [*Wainwright v.*] *Sykes*, 433 U.S. 72 (1977) that there was "cause" for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Caver v. Straub, 349 F.3d 340, 346 (6th Cir. 2003) (quoting *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986)).

Finally, the Court notes that in *Teague v. Lane*, 489 U.S. 288, 311-13 (1989), the plurality barred the application of new procedural rulings in the collateral review of convictions that became final before those rulings were announced. A conviction becomes final for the purposes of *Teague* when "the availability of direct

appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Beard v. Banks*, 542 U.S. 406, 411 (2004) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (internal quotation marks omitted)). The *Teague* opinion, however, delineated two exceptions. The first, which is not pertinent to this controversy, is that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague v. Lane*, 489 U.S. at 311 (internal citations omitted). The second exception is for "new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding" and improve the accuracy of the criminal process. *Gaines v. Kelly*, 202 F.3d 598, 604 (2d Cir. 2000) (quoting *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990) (quoting *Teague v. Lane*, 489 U.S. at 311)).

With these guiding principles in mind, the Court will now address Woodall's petition and his objections to the Magistrate Judge's Report and Recommendation.

IV. ANALYSIS

A. NO ADVERSE INFERENCE INSTRUCTION

Woodall did not testify at the penalty phase. As a result, he requested the trial judge to instruct the jury that he had no obligation to testify and that no adverse inference could be drawn from his failure to do so. The

Commonwealth did not object. The trial judge, however, refused to give the instruction:

> THE COURT: --the tendered instruction. It was on my desk. I guess it's still there. The defendant has tendered an instruction to be given at this sentencing stage on the defendant's right not to testify, and I'm going to refuse that tendered instruction. It is marked and tendered, and I think I need to state my grounds for the record. I don't think the Commonwealth has objected to it being read is that correct?
>
> PROSECUTOR: That is correct, your honor.
>
> THE COURT: And the Court--it might be an easy way out to go ahead and give it, except, I don't think [it's] intellectually honest and I don't think it's in keeping with the case law as far as sentencing is concerned. The Court has the responsibility of not just giving instructions to juries just for the sake of protecting the record and being beyond an abundance of caution. It's the responsibility of the Court not only to be a gatekeeper of evidence, but also to be fair on the law. This defendant has waived his right to self-incrimination and has entered pleas of committing the

> crimes of rape and murder and kidnapping and has asked the jury to set his sentence. The Court is aware of no case law that precludes the jury from considering the defendant's lack of explanation of remorse or explanation of the crime or anything else once guilt has been adjudged in sentencing. . . . ***I just don't think that it's appropriate to instruct the jury that the failure of the defendant to take the stand when he stands convicted of these very serious crimes is in keeping with the law.***
>
> . . .
>
> There's no question I'd give it if we were talking about guilt or innocence. In the sentencing stage to me it defies logic, it defies common sense, it's not intellectually honest to tell this jury . . . that you go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that. I just don't think its logical, so that's why I'm not going to give it.

TE 12 at 1588-92 (emphasis added).

Woodall argues that the trial court's failure to instruct the jury as requested violated his Fifth and Fourteenth Amendment rights. On direct appeal, the majority of the Kentucky Supreme Court rejected Woodall's claim as follows:

> Woodall pled guilty to all of the charged crimes as well as the aggravating circumstances. The no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. That is not the situation presented here. The instruction contemplated by *Carter v. Kentucky*, 450 U.S. 288 (1981), could not have changed the outcome of a guilty determination that the defendant acknowledged by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.
>
> There is no error in this respect. Any possible error would be nonprejudicial because the defendant admitted the crimes and the evidence of guilt is overwhelming. Woodall claims that *Estelle v. Smith*, 451 U.S. 454 (1981), extended Fifth Amendment protection and thus the *Carter, supra*, rule to the penalty phase of a trial. *Estelle, supra*, is not a jury instruction case, unlike *Carter*. *Estelle* does not cite to *Carter* or indicate

that *Carter* has been extended. The factual situation in *Estelle* is different from that presented in this case because it involved the use of an out-of-court statement the defendant made to a government expert. The statement in that case was in regard to a psychological examination by the government prosecutors which was used against the defendant without warning in the penalty trial. Neither *Carter* nor *Estelle* involved a guilty plea. Here, Woodall admitted guilt to all charges and did not contest the facts. He was not compelled to testify so there were no words that could be used against him so as to implicate the Fifth Amendment privilege as in *Estelle*.

Woodall contends that *Mitchell v. United States*, 526 U.S. 314 (1999), permits a guilty plea which does not waive the privilege against self-incrimination at the sentencing phase. *Mitchell, supra*, does not apply here. In *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine within 1000 feet of a school or playground. She reserved the right to contest the amount of the cocaine at the penalty phase. The amount of the cocaine would determine the range of penalties. She only admitted that she had done

> "some of" the conduct charged. She did not testify. Three other codefendants did testify as to the amount of cocaine she had sold. Ultimately, the U.S. Supreme Court ruled that it would not permit a negative inference to be drawn about her guilt with regard to the factual determination respecting the circumstances and details of the crime. Here, Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes.
>
> The decision of the trial court not to give an adverse inference instruction does not amount to constitutional error so as to require reversal. There is no violation of any section of the United States or Kentucky Constitution.

Woodall, 63 S.W. 3d at 115.

Justice Stumbo dissented as follows:

> Respectfully, I must dissent from the majority opinion. My primary disagreement with the majority stems from the ruling that there was no error in the failure of the trial court to instruct the jury that no adverse inference should be drawn from Appellant's decision not to testify during the penalty phase of the trial. The majority opinion states that

this is not an error because Appellant entered a guilty plea to the charges and the evidence of guilt was overwhelming. Because he pled guilty, according to the majority, a no adverse inference instruction could have no effect on a determination of guilt and, thus, no negative inferences could be drawn by the jury from Appellant's silence.

The plain language of *Mitchell v. United States*, 526 U.S. 314 (1999), disputes the conclusion reached by the majority. Therein, the United States Supreme Court stated as follows:

> The rule against adverse inferences from a defendant's silence in criminal proceedings, including sentencing, is of proven utility. Some years ago the Court expressed concern that "too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." . . There can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition. . . .

> The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.

Mitchell, 526 U.S. at 329, quoting *Ullmann v. United States*, 350 U.S. 422 (1956).

The majority would have us eradicate the important Constitutional right involved here by failing to require the trial court to give the requested instruction. The majority states that the instruction is not necessary because Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes. That may be so, but Appellant did contest the sought penalty of death during his penalty phase trial. He cross-examined the eleven witnesses presented by the

> Commonwealth and presented fourteen witnesses of his own who testified about Appellant's life and the effects his upbringing had on him. As noted in *Mitchell*, 526 U.S. at 327, "it appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of [his] guilt or innocence than with the severity of [his] punishment." For Appellant herein the stakes could not have been higher and his Fifth Amendment rights could not have been more important.

Woodall, 63 S.W.3d at 134-35.

The Magistrate Judge concluded that the Kentucky Supreme Court properly applied United States Supreme Court precedent in rejecting this claim. As explained below, this Court disagrees with that conclusion.

The Fifth Amendment's command that no person should be compelled to be a witness against himself in a criminal proceeding is applicable against the States through the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 3 (1964). The Supreme Court first considered the right to a no adverse inference instruction in *Carter v. Kentucky*, 450 U.S. 288, 302 (1981). In *Carter*, the defendant was sentenced to twenty years for burglary. At his trial, the trial judge refused to instruct the jury that the defendant's failure to testify could not be used as an inference of guilt. The

Supreme Court granted certiorari to determine whether upon request a defendant has a right under the Fifth and Fourteenth Amendments to a no adverse inference instruction. *Id.* at 290. The *Carter* court began its analysis by observing that "instructing a jury in the basic constitutional principles that govern the administration of criminal justice is often necessary." *Id.* at 302 (internal citations omitted). The Court went on to explain:

> A trial judge has a powerful tool at his disposal to protect the constitutional privilege -- the jury instruction -- and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

Id. at 303. Accordingly, the *Carter* court held that "a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify" by giving a no adverse inference instruction. *Id.* at 305.

Two months following *Carter*, in *Estelle v. Smith*, 451 U.S. 454, (1981), a capital case, the Court considered the issue of whether in a bifurcated trial the

defendant retains a Fifth Amendment right through the sentencing phase. Prior to trial the defendant in *Estelle* was required to undergo a psychiatric examination. During the penalty phase, the doctor who administered the examination was called by the prosecution to testify about the defendant's future dangerousness. The defendant argued that the testimony violated his Fifth and Fourteenth Amendment rights against self-incrimination because he was not advised of those rights prior to the psychological examination. The state argued that the defendant was not entitled to the protection of the Fifth Amendment because the testimony was used only to determine punishment after conviction, not to establish guilt. The Supreme Court held that there was "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Id.* at 462-63. Accordingly, because the defendant's Fifth Amendment rights were violated during the sentencing phase, the Court vacated the defendant's death sentence.

Also relevant is *Mitchell v. United States*, 526 U.S. 314 (1999). Mitchell pleaded guilty to federal drug charges, but reserved the right at sentencing to contest the drug quantity. At the sentencing hearing, the judge ruled that as a consequence of her guilty plea Mitchell had no right to remain silent with respect to the details of her crime. The judge told Mitchell, "'I held it against

you that you didn't come forward today and tell me that you really only did this a couple of times . . . . I'm taking the position that you should come forward and explain your side of this issue.'" *Id.* at 319. Mitchell's case presented the Supreme Court with two questions relating to a criminal defendant's Fifth Amendment privilege against self-incrimination: 1) whether in the federal criminal system, a guilty plea waives the privilege in the sentencing phase of the case, either as a result of the colloquy preceding the plea or by operation of law when the plea is entered; and 2) whether, in determining facts about the crime which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence.

The *Mitchell* Court began its analysis of the first question by observing that it was already well-established through *Estelle* that in a bifurcated proceeding the Fifth Amendment right against self-incrimination survives even though guilt has been already been determined. While the Court observed that "where there can be no further incrimination, there is no basis for the assertion of the privilege," it limited this principle "to cases in which the sentence has been fixed and the judgment of conviction has become final." *Mitchell v. United States*, 526 U.S. at 314. The *Mitchell* Court then explained:

> Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony. As the Court

stated in *Estelle*: "Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." 451 U.S. at 463. *Estelle* was a capital case, but we find no reason not to apply the principle to noncapital sentencing hearings as well. "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" 451 U.S. at 462 (emphasis in original) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961)). . . . [I]t appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her punishment. ***Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime. To say that she had no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important.***

Id. at 329-30 (emphasis added). Thus, the *Mitchell* court held that the Fifth Amendment applies in the sentencing phase even if the defendant has pleaded guilty.

The *Mitchell* Court then confronted the question of whether Mitchell's sentencing judge acted contrary to the Constitution when he held her failure to testify against her. Relying on *Estelle* and *Griffin v. California*, 380 U.S. 609 (1965)[1], the Court reaffirmed that:

> The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing. Without question, the stakes are high: Here, the inference drawn by the District Court from petitioner's silence may have resulted in decades of added imprisonment. The Government often has a motive to demand a severe sentence, so the central purpose of the privilege -- to protect a defendant from being the unwilling instrument of his or her own condemnation -- remains of vital importance.

---

[1]In *Griffin*, the United States Supreme Court held that the self-incrimination guarantee of the Fifth Amendment, in its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on an accused's silence or instructions by the court that such silence is evidence of guilt.

Mitchell v. United States, 526 U.S. at 329. Thus irrespective of the plea, the Court held that: "By holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination." *Id.* at 330.

In sum, *Carter* established that under the Fifth Amendment a defendant has the right to receive a no adverse inference instruction if one is requested. *Estelle* clarified that a capital defendant retains his Fifth Amendment right to remain silent during sentencing, even if guilt has already been established. And, *Mitchell* affirmed that the Fifth Amendment right to remain silent, including the prohibition against negative inference, remains intact through sentencing, even where a defendant pleads guilty to the substantive offense. When these three cases are read together, as they must be, there is but one reasonable conclusion that can be reached--a capital defendant has a Fifth Amendment right to a no adverse inference instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement.

In recommending that the Court reject this claim, the Magistrate Judge focused on a passage from *Mitchell* in which the Court stated: "Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in *Id.*3E1.1 of the

United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it." *Mitchell v. United States*, 526 U.S. at 330. From this passage, the Magistrate Judge concluded that it was not per se impermissible for the jury to consider Woodall's lack of remorse in sentencing him to death. While this *might* be the case, it is not the precise issue before the Court.[2] The issue before the

---

[2]The Magistrate Judge also relied on a smattering of other opinions. However, none involve the issue faced by this Court. First, in *Issacs v. Head*, 300 F.3d 1232 (11th Cir. 2002), the government called a reporter to the stand to testify against the defendant. The reporter testified that during an interview the defendant stated that he would commit the crime again if he had it to do all over. The trial court then instructed the jury that they could consider "all aspects of the defendant's character, including but not limited to, . . . any evidence of remorse or lack thereof." *Id.* at 101. The *Issacs* court held that the defendant's rights were not violated because the instruction and the government's closing arguments were based on other evidence (primarily the reporter's testimony), *not the defendant's silence at trial*. *Id.* at 1271 ("We believe that this is such a case in which the Georgia Supreme Court reasonably could conclude that the arguments and comments concerning Isaacs' lack of remorse did not implicate the right not to testify."). Likewise, *Hemby v. Hannigan*, 117 F. Supp. 2d 1057 (D. Kan. 2000) and *Burr v. Bertrand*, No. 04-C-992, 2007 U.S. Dist. LEXIS 80805 (E.D. Wis. Oct. 31, 2007), did not involve an adverse inference instruction. The district court in *Hemby* accepted the state court's factual finding that the trial court did not actually rely on defendant's silence in sentencing. *Id.* ("In the present case, the Kansas Supreme Court upheld the sentence of 15 years to life, finding the trial court's reliance on petitioner's lack of remorse was indicated by sentencing evaluation and other reports in the record, and not defendant's silence at sentencing. Because this decision is supported by the record, and is not contrary to or an unreasonable application of Supreme Court precedent, petitioner is entitled no relief on this claim."). The

Court is whether Woodall was entitled to a no adverse inference instruction. Unquestionably, Woodall was entitled to it. In this case, Woodall pleaded guilty to the underlying substantive offenses. He did not, however, agree that the sentence of death was appropriate. Instead, he retained the right to have his sentence determined by a jury of his peers. His Fifth Amendment right survived his guilty plea. *Mitchell v. United States*, 526 U.S. at 327. The government could not have compelled Woodall to testify against his will at his sentencing hearing. *Estelle v. Smith*, 451 U.S. at 454. Such conduct would have undoubtedly violated his Fifth Amendment right. *Id.* Woodall requested a no adverse inference instruction. Once requested, it should have issued. *Carter v. Kentucky*, 450 U.S. at 305. The trial judge could have given the requested instruction and prevented any undue and impermissible speculation by the jury. Even though the prosecution did not object to the instruction, the trial judge refused to issue it. In doing so, he ran afoul of clearly established constitutional principles and violated Woodall's constitutional rights. This is not a

---

district court in *Burr* reached a similar conclusion: "It appears that the court's conclusion regarding Burr's lack of remorse rested upon circumstances other than Burr's exercise of his right to silence. Therefore, Burr fails to demonstrate that his right to against self incrimination was violated by the sentence imposed." The Magistrate Judge also cited *Emmett v. True*, No. 7:05cv00329, 2006 U.S. Dist. LEXIS 11125 (W.D. Va. Jan. 27, 2006). Unlike the present case, the trial judge in *Emmett* affirmatively instructed the jury not to consider Emmett's failure to testify. The issue in *Emmett* was whether the jury disobeyed the instruction. The issue in this case is fundamentally different than the issues decided in the above-cited cases.

new rule of law as the Commonwealth argues. To the contrary, it is a logical application of then-existing Supreme Court precedent. And, the Kentucky Supreme Court's decision to reject this claim was an unreasonable application of *Carter*, *Estelle*, and *Mitchell*.

The Commonwealth argues that even so, the requested writ should not issue because any error in this regard was "harmless." For purposes of federal habeas corpus review, a constitutional error that implicates trial procedures shall be considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The United States Supreme Court recently reaffirmed use of the *Brecht* standard "whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman [v. California*, 386 U.S. 18 (1967)]. . . ." *Fry v. Pliler*, --U.S.--, 127 S. Ct. 2321, 2328, 168 L. Ed. 2d 16 (2007). This standard also applies to constitutional errors in the sentencing process. *Stewart v. Erwin*, 503 F.3d 488, 501 n.5 (6th Cir. 2007).

When applying the *Brecht* standard, rather than place a burden on a party to prove or disprove an error's effect or influence on the verdict, the Supreme Court has clarified that it is for the judge sitting on habeas review to decide whether the error so influenced the verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435-38 (1995). If the judge is sure that the error

had no or very slight effect or influence, the verdict and judgment must stand. *Id.* However, if "the matter is so evenly balanced" that the judge has grave doubts as to whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, the judge must treat the error as if it did and grant the habeas writ. *Id.* at 435.

The Supreme Court has noted, however, that certain errors implicating fundamental constitutional process may require the reversal of a conviction without resorting to a harmless-error analysis. *Brecht v. Abrahamson*, 507 U.S. at 638 n.9. The Court thus divided constitutional errors into two classes: 1) "trial errors," which occurred during presentation of the case to the jury and whose effect may be "'quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt'"; and 2) "structural defects," which "'defy analysis by "harmless-error" standards'" because they "'affec[t] the framework within which the trial proceeds,'" rather than being "'simply an error in the trial process itself.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

In *Carter*, the Supreme Court observed that "it is arguable that a refusal to give an instruction similar to the one that was requested here [a no adverse inference instruction] can never be harmless." *Carter v. Kentucky*, 450 U.S. at 304. Nevertheless, the *Carter* court declined to reach the issue because it had not been presented to or considered by the lower court. This Court is inclined to agree with the *Carter* court

that it is doubtful whether an error of this magnitude can ever be harmless. Nevertheless, out of an abundance of caution, the Court will engage in a harmless error analysis.

The Commonwealth argues that the failure to give the no adverse inference instruction was "harmless" because Woodall admitted the statutory aggravators necessary to impose the death penalty. This argument would be persuasive if the finding of the aggravators required imposition of the death penalty. It did not. The jury was free to reject the death penalty even if it found the existence of aggregating circumstances beyond a reasonable doubt. Thus, even though Woodall admitted all the elements necessary for the jury to impose the death penalty, he requested the jury not to do so. In the absence of a no adverse inference instruction, the jury may have based its decision to sentence Woodall to death in part on his failure to testify. Certainly, this is a reasonable conclusion, and one the Court cannot rule out. This is especially true given the fact that the trial judge so forcefully stated on the record that he felt that the jury could consider Woodall's failure to offer an explanation for the crimes. If the trial judge, a man trained in the law, held this fact against Woodall then it is possible, indeed probable, that the jury did so as well. The Court cannot say for certain that the jury did not. "If a habeas court is in 'grave doubt' as to the harmlessness of an error, the habeas petitioner must prevail." *Bates v. Bell*, 402 F.3d 635, 649 (6th Cir. 2005) (citing *O'Neal v. McAninch*, 513 U.S. at 436). Accordingly, the Court must presume the error was not harmless.

The Court concludes that the Commonwealth violated Woodall's Fifth Amendment right (made applicable to the states via the Fourteenth Amendment) by refusing to give a no adverse inference instruction after Woodall's counsel requested it. The Kentucky Supreme Court's rejection of this claim is an unreasonable application of *Carter*, *Estelle*, and *Mitchell*. Therefore, the Court must grant Woodall's petition for a writ of habeas corpus on this ground.

B. THE BATSON OBJECTION

Woodall claims that his Fifth, Eighth, and Fourteenth Amendment rights were violated when the trial court allowed the Commonwealth to use a peremptory challenge to strike an African-American member of the jury pool, Carla Diggs. During the questioning of Woodall's jury pool, both the trial court and counsel questioned Ms. Diggs. She stated that she had not heard anything about the case prior to being called for jury duty. She also stated without hesitation that she could consider the entire range of penalties and that she would listen to the evidence presented by both sides before reaching a decision. She concluded by stating, "I think I can be fair." TE 5 at 667-77. At the end of this questioning, neither the prosecution nor defense moved to strike Ms. Diggs for cause. However, the Commonwealth used one of its peremptory strikes to exclude Ms. Diggs, the only remaining African-American, from the jury pool. Woodall objected under *Batson v. Kentucky*, 476 U.S. 79 (1986). Thereafter, the following colloquy took place between counsel and the trial court:

DEFENSE COUNSEL: We also want to make a motion regarding the jury under *Batson*. We had one African-American juror left in the pool, and I asked Mr. Vick to tender his --well, his strike sheet has been tendered, and I'm assuming that that juror was struck, and therefore, we think there's no racial mix on the jury and that that's a violation of that case.

. . .

PROSECUTOR: In response to the *Batson* [objection], I have attempted to print, and I think its legible, my reason for that particular strike under *Batson*. If the Court could need a further explanation, I'll be glad to state at this time that the juror questionnaire stated that she did not trust anyone. There were several other responses of negative statements and her questionnaire was the basis for the Commonwealth's strike of that particular juror.

THE COURT: The record should reflect, because it's color blind, that this defendant is white.

DEFENSE COUNSEL: I understand that, Judge, but I think we've still got the right to raise that issue.

. . .

> THE COURT: I don't know whether you do or not, but anyway the objection is noted, and counsel is correct that I am allowing them to defer until after the opening statements for their objections they had regarding some other matters.

TE 8 at 1165-66.

On direct appeal, the majority of the Kentucky Supreme Court rejected this claim as follows:

> Woodall argues that he was denied due process and equal protection of the law because the trial judge failed to conduct an inquiry into and make findings of fact concerning the alleged discriminatory intent and credibility of the reasons given by the prosecutor for a peremptory challenge of the only African American in the final jury pool. At the conclusion of the *voir dire* examination, only one African American remained in the jury pool. The other African American called for jury duty had been challenged and removed for cause. No motion was made to strike the remaining juror for cause but the prosecution exercised a peremptory strike against her. In a response to an objection by the defense, the prosecutor stated that the juror had been struck because she answered a question on a jury questionnaire to the effect that she

"did not trust anyone." Woodall contends that the prosecution struck the juror solely because of her race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

In *Batson, supra*, the United States Supreme Court promulgated a three step process for determining whether peremptory challenges had been properly exercised. First, a defendant must establish a *prima facie* case of racial discrimination. Second, the prosecutor must provide a race neutral reason for the exercise of the peremptory challenge, and third, the trial court is to conduct an inquiry into the ultimate question of whether there was discriminatory intent in the exercise of the peremptory challenge. Our examination of the record in this case indicates that the justification for striking peremptorily the one remaining African American juror was not a pretext for racial discrimination. The Commonwealth can rely on a jury questionnaire to derive its race neutral reasons for striking a juror. *Commonwealth v. Snodgrass*, Ky., 831 S.W.2d 176 (1992). An attitude of mistrust expressed on a juror questionnaire should be given the same weight as an attitude of mistrust or bias expressed by a juror on *voir dire* examination. *Batson* was not intended to

> remove all prosecutorial discretion as to the use of peremptory challenges but only to eliminate the obviously bad practice of eliminating potential jurors because of their race only. The evaluation of whether the offered reasons for a prosecutorial challenge remains in the sound discretion of the trial judge. *See U.S. v. McMillon*, 14 F.3d 948 (4th Cir. 1994), which stated in part that the trial court, present on the scene, found the reasons articulated were both nondiscriminatory and actual. Under all the circumstances, the trial judge did not abuse his discretion by rejecting the *Batson* challenge. *Bell-Bey v. Roper*, 499 F.3d 752 (8th Cir. Mo. 2007).

Voodall, 63 S.W.3d at 120-21.

Justices Stumbo and Keller dissented as follows:

> Finally, as to the *Batson* challenge, I would have remanded this case to the trial court for a hearing at which time the Court should conduct an inquiry into the ultimate question of whether there was discriminatory intent in the exercise of the peremptory challenge. None was held and there was no ruling by the trial court on the legitimacy of the prosecution's explanation because the trial court apparently, and erroneously, believed that because Appellant was white, he had

> no ground to object to the exclusion of the sole black juror remaining in the venire. "[A] criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

Id. at 134.

The Magistrate Judge concluded that the majority of the Kentucky Supreme Court decided this claim correctly. For the reasons explained below, this Court disagrees.

The Constitutional guarantee of equal protection ensures that a party may not exercise a peremptory challenge to remove an individual on account of that person's race. *See Batson v. Kentucky*, 476 U.S. at 79. Because jury service represents "a significant opportunity to participate in civic life," white defendants, such as Woodall, have standing to assert the equal protection rights of excluded black venire persons. *Powers v. Ohio*, 499 U.S. 400, 409 (1991); *Echlin v. LeCureux*, 995 F.2d 1344, 1348 (6th Cir. 1993) ("White defendants are now accorded the same equal protection right as minority defendants to prevent the systematic exclusion of minority jurors."). In *Purkett v. Elem*, 514 U.S. 765 (1995), the Supreme Court set forth the required analysis under *Batson*:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has

> made out a *prima facie* case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible. At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Id. at 767-68 (citations omitted) (alteration in original). The "evaluation of a prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). "In considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, --U.S.--, 128 S. Ct. 1203, 1208 (2008).

In this case, it is clear from a review of the transcript that the trial court did not undertake the required *Batson* analysis or even allow the parties the

opportunity to adequately develop the record with respect to this objection. This failure was apparently due to the fact that the trial court doubted that Woodall, a white defendant, had the right to make a *Batson* objection. The trial court's failure to articulate any meaningful finding on the record is significant. In *United States v. Harris*, 192 F.3d 580 (6th Cir. 1999), the Sixth Circuit held that a district court's failure to engage in any type of analysis of the prosecutor's motivation constituted reversible error justifying a remand for further inquiry on the *Batson* question. There, the district court denied the *Batson* challenge because the jury already contained one African-American and because the panel members who were the basis of the *Batson* objection would serve as alternates, rather than actual jurors. The Sixth Circuit rejected the district court's reasoning and found that the district court's reliance on impermissible factors, such as the jury's composition, left it with no choice but to reverse. *Id.* at 588.

"In reviewing Petitioner's *Batson* claim, which presents a mixed question of law and fact, our review necessarily focuses on the reasonableness of the decisions of the state courts--that is, whether those decisions constituted an unreasonable application of Supreme Court precedent." *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003). The Kentucky Supreme Court's decision is an unreasonable application of *Batson* and its progeny. The Kentucky Supreme Court ignored the fact that the trial judge did not conduct the required *Batson* analysis or even recognize that Woodall had the right to make a *Batson* objection.

The trial court's failure to do so was based on its incorrect belief that Woodall was not entitled to rely on *Batson* because he was white. This Court concludes that any other reading of the transcript is unreasonable.

Citing *Rice v. Collins*, 546 U.S. 333, 338-39 (2006), the Commonwealth asserts that it makes no difference that the trial court did not conduct a *Batson* analysis because the Kentucky Supreme Court concluded on direct review that race was not a motivating factor in the prosecution's decision to strike Ms. Diggs. In *Rice*, however, the Supreme Court explicitly pointed out that nothing about the state court of appeal's review "suggested the trial court failed to conduct a searching inquiry of the prosecutor's reasons for striking [the juror]." *Id.* Here, that cannot be said. The record demonstrates that the trial court did not conduct a *Batson* inquiry. The trial judge stated that Woodall was white, indicated that he was doubtful Woodall had the right to rely on *Batson*, noted the objection for the record, and moved on. The record related to this claim was never fully developed because the trial judge did not recognize Woodall's right to make a *Batson* objection.

This case is more akin to *Harris v. Haeberlin*, 526 F.3d 903 (6th Cir. 2008). In *Harris*, the defense team discovered evidence of a videotaped conversation among the prosecutorial team as it was discussing the exercise of its peremptory challenges. This evidence was not considered by the trial court when it conducted its *Batson* analysis because it was not known at that

time. On appeal, the Kentucky Supreme Court reviewed the tape and determined that no *Batson* violation had occurred. Distinguishing *Rice*, the Sixth Circuit held that: "In a case such as the one before us . . . where the appellate court has before it new evidence providing direct information about the prosecutor's state of mind, clearly established federal law regarding the trial court's superiority in making credibility determinations in a *Batson* hearing persuades us that a remand is appropriate." *Id.* at 912.

The trial court did not give any serious consideration to Woodall's *Batson* objection. Having only the trial transcript before it, the Kentucky Supreme Court for the first time in the case attempted to analyze the objection. The record, however, had never been properly developed because the trial judge shut down further argument on the issue by stating that Woodall was white and simply "noting the objection." The Kentucky Supreme Court unreasonably applied clearly established federal law, as enshrined in *Batson*, *Powers*, *Hernandez*, and their progeny, when it excused the trial court's failure to conduct a *Batson* analysis and attempted to undertake a post hoc review of the objection with only the written transcript before it. *See Harris*, 526 F.3d at 913-14 ("[S]everal aspects of the [*Batson*] opinion convince us that the case in fact holds that ***trial courts, not appellate courts,*** are to assume the responsibility of making factual determinations regarding a *prima facie* showing of discrimination, the prosecution's race-neutral explanation, and the ultimate existence of purposeful discrimination.") (emphasis added).

For the reasons set forth above, Woodall is entitled to the issuance of a writ on this claim. Nevertheless, the Court believes this to be a close call. The prosecutor did set forth an arguable race neutral reason for the exercise of the peremptory challenge. The problem is the trial Court never conducted further inquiry. The Kentucky Supreme Court seems to have said the reasons set forth by the prosecutor was race neutral and no reasonable jurist could find differently. However, that is an initial inquiry reserved for the trial court. Since the writ has been issued on other grounds, the Court felt this issue should likewise be reviewed. Had this been the only ground that the Court determined mandated the issuance of a writ, it would have issued it conditionally and remanded the case to the trial court to conduct the appropriate *Batson* hearing. In this case, however, the Court has determined that Woodall is entitled to the writ on a separate ground that requires the state court to vacate his death sentence. Accordingly, it would be futile as this point to direct the state court to conduct a *Batson* hearing.

C. EXCUSAL OF VENIREMEN HOPSON AND THOMPON FOR CAUSE

Woodall claims that two members of the venire panel, Bessie Hopson and Richard Thompson, were improperly removed for cause by the trial court.

The relevant portion of Bessie Hopson's *voir dire* is quoted below:

THE COURT: Ms. Hopson, if you find beyond a reasonable doubt the existence of certain aggravating factors there will be a range of penalties for you to consider . . . Would your personal beliefs prevent you or substantially impair you from considering and imposing any of these five punishments if instructed to do so by the court and you found was warranted by the evidence? Do you understand the question?

MS. HOPSON: Yeah, I think so.

THE COURT: Will you be able to consider each of these penalties involved in this case?

MS. HOPSON: I think so.

THE COURT: Would you automatically vote for any of these particular penalties?

MS. HOPSON: Yes.

THE COURT: You would automatically vote for one of them?

MS. HOPSON: Yes, I would.

THE COURT: And what penalty would that be?

MS. HOPSON: I'd say maybe 25 years.

THE COURT: Alright, You're saying that you would vote for 25 years--

MS. HOPSON: Without parole.

THE COURT: Pardon?

MS. HOPSON: I think I didn't say without parole?

THE COURT: Okay. The one that says life without parole for 25 years.

MS. HOPSON: Uh-huh.

THE COURT: You think you would automatically vote for that penalty?

MS. HOPSON: I think I would.

THE COURT: Alright. Are you telling us that that's what you would vote for if you had to determine a sentence right now based what the charges are and what he's pled guilty to? Is that what you're saying.

MS. HOPSON: Yeah.

THE COURT: If you're selected as a juror and each side presents evidence and the Court instructed you that you are to

consider all these different penalties, would you be able to consider all those penalties and not automatically at the time impose the sentence of life without parole for 25 years?

MS. HOPSON: It could be considered.

THE COURT: Alright, but do you think you could consider the entire range of penalties based--and make your determination based upon the evidence?

MS. HOPSON: Yes.

THE COURT: In other words, when I say you would not automatically or would you automatically set a certain sentence, I want to know that if you heard the evidence that was presented to you by both sides in this case would you be willing to not set a sentence automatically, but consider the entire range of penalties?

MS. HOPSON: I think it should be considered, the entire range.

. . .

THE COURT: Did any of this that you've read about cause you to formulate this opinion--you indicated that you had a notion it should be life without parole for

25 years I think. That's a notion we're talking about. Was this based upon what you read and heard about this case?

MS. HOPSON: Yes.

THE COURT: And would you be able to disregard anything you may have read or heard and decide this case solely on the evidence and consider this entire penalty range? Would you be able to do that?

MS. HOPSON: Well, if it comes up, it all depends.

THE COURT: Depends on what?

MS. HOPSON: The evidence.

. . .

PROSECUTOR: Do you have any religious beliefs or feelings against any of those range of punishments?

. . .

MS. HOPSON: I don't like capital punishment

THE PROSECUTOR: Pardon, me?

MS. HOPSON: Not capital, not you know, not the chair.

THE PROSECUTOR: I'm sorry?

MS. HOPSON: I couldn't go for the chair.

. . .

THE PROSECUTOR: Are you opposed to --does your belief, your feelings inside you prevent you from really considering the death penalty?

MS. HOPSON: No, I wouldn't consider that.

THE PROSECUTOR: You could not consider that.

MS. HOPSON: Uh-uh.

. . .

THE PROSECUTOR: The Commonwealth moves to have Ms. Hopson struck for cause. I'd like for the record to reflect that on each occasion she was sitting in the chair she did not look at the questioner unless you asked her to. She was looking in the opposite direction and thought she was talking to --I know when she started talking to --she was looking at Mr. Baker when you were talking to her and that Mr. Baker was talking to her and looked the same way as

well. She's 78 years of age and she did say that she was opposed to the death penalty and could not impose it.

THE COURT: Any response.

DEFENSE COUNSEL: Judge, she is an elderly black woman, but she--under questioning by counsel she said that she could follow the law as you--as you instructed her to do and could consider the death penalty, and I don't see much difference in her and Ms. Pruett and a couple of others that we've---she seemed to understand all the questions also, your honor. She did respond. So we would motion that she stay on.

THE COURT: This juror has problems. I don't know what they were, but she--as Mr. Vick indicated she either didn't see--she didn't perceive where the questions were coming from. She was looking at people that were not asking her questions. I think she's going to have problems following the evidence first. She's 78 years old. Something wasn't right about her. I think she's not--arguably she has a pretty good recall of what she read, but she wasn't connecting here some way or another, and I think she would have said almost anything. She basically answered the

> questions I asked the way she thought I wanted to when she said she could not consider the death penalty, she said it with conviction, and I think that she is not qualified to serve. So I'm going to grant the motion over the objection of defense counsel.

TE 6 at 858-75.

The relevant portion of Richard Thompson's *voir dire* is quoted below:

> THE COURT: Would you automatically impose any of these penalties?
>
> MR. THOMPSON: No Sir.
>
> . . .
>
> DEFENSE COUNSEL: The Judge talked with you briefly about the possible penalty ranges in a case of this nature. Now I want to ask you in a case of intentional murder, rape, and kidnapping, could you consider--frankly and honestly could you consider imposing a sentence of 20 years?
>
> MR. THOMPSON: I don't know.
> DEFENSE COUNSEL: Well, I didn't quite hear.

MR. THOMPSON: I'm not sure.

DEFENSE COUNSEL: If you--now, we're talking about an intentional murder, a rape, and a kidnapping. Could you impose or could you consider imposing the death penalty in a case like that?

MR. THOMSPON: No sir, I don't think I could do that.

. . .

DEFENSE COUNSEL: And if the Judge told you as part of the law you would have to consider as one of those [possible sentences] twenty to fifty years, life, life without parole, life with no parole, and the death penalty and you had to give each and every one of those fair consideration, could you do that?

MR. THOMPSON: I don't think I could consider the death penalty as far as something like that, no sir.

. . .

THE PROSECUTOR: Your honor, the Commonwealth would move to strike for cause upon his testimony he could not consider imposing the death penalty.

THE COURT: Any response.

DEFENSE COUNSEL: No response.

THE COURT: The motion will be granted. Have Mr. Thompson come back in.

TE 7 at 935-42.

On direct appeal, the majority of the Kentucky Supreme Court rejected this claim as follows:

> After an exhaustive examination of the record in regard to the first potential juror, we conclude that the trial judge did not abuse his discretion in excusing her for cause. The potential juror was relatively articulate and knowledgeable about the different range of penalties available in the case. She expressed a considerable interest in a penalty of life in prison for 25 years without hope of parole. Near the end of the *voir dire* by the prosecution, she clearly stated that she did not like capital punishment and that she would not consider it period. Although the potential juror was 78 years old, she seemed to be in full command of her faculties and knowledgeable about the legal system.
>
> The second juror indicated a hesitancy and an ambivalence about the death

> penalty. When asked if he could consider the range of possible punishments, including death, he answered "No sir, I don't think I could do that." Later, when asked if he could consider death if the judge instructed the jurors to give each one fair consideration, the juror answered, "I don't think I could consider the death penalty as far as something like that, no sir." The second juror was struck for cause and the defense made no objection. Both jurors were properly struck for cause.

Woodall, 63 S.W.3d at 119-20.

The Magistrate Judge concluded that this claim was procedurally defaulted with respect to the second juror, Mr. Thompson. The Court disagrees with the Magistrate Judge that this part of the claim is barred by procedural default. While the Kentucky Supreme Court mentioned that Woodall did not object at trial to the exclusion of Mr. Thompson, it does not appear that the Kentucky Supreme Court "actually enforced the state procedural sanction." *Caver v. Straub*, 349 at 346. The Kentucky Supreme Court analyzed the claim substantively without relying on the lack of a trial objection to support any part of its holding with respect to this part of the claim. The Kentucky Supreme Court quoted from Mr. Thompson's *voir dire* and found that he was properly struck for cause. As such, this Court is barred from relying on procedural default. *Id.*

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI. The right to an impartial jury is applicable to the states by way of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court held that it was improper to exclude veniremen simply because they voiced general objections to the death penalty or expressed conscientious or religious objections to its imposition. The proper standard for determining when a prospective juror may be excluded for cause is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainright v. Witt*, 469 U.S. 412 (1985).

The Supreme Court recently characterized *Witherspoon, Wainright*, and their progeny as "establish[ing] at least four principles of relevance" to the question of a juror's death-qualification. *Uttecht v. Brown*, – U.S.–,127 S. Ct. 2218, 2224, 167 L. Ed. 2d 1014 (2007).

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law

> prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts.

Id. (internal citations omitted). As the Supreme Court observed, "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Id.*

The prosecution in *Uttecht* struck for cause a juror to whom the Court referred as "Juror Z." *Id.* at 2222. Juror Z initially indicated that he could impose the death penalty in "severe situations." *Id.* at 2226-27 (internal quotation marks omitted). When asked to give examples of such situations, he said that the death penalty would be appropriate if a defendant affirmatively wanted to die or would inevitably re-offend upon release. After being informed by defense counsel that the defendant would never, under any

circumstances, be released from prison, Juror Z expressed uncertainty about his ability to impose a death sentence. "Over the course of his questioning, he stated six times that he could consider the death penalty or follow the law, but these responses were interspersed with more equivocal statements." *Id.* at 2227. The prosecution challenged Juror Z for cause, citing his confusion about the proper circumstances for the imposition of a death sentence. The defense volunteered that it had no objection, and the trial court excused Juror Z. The Ninth Circuit granted the defendant's federal habeas petition, holding that the state courts had not found Juror Z to be substantially impaired and, further, that "the transcript unambiguously proved Juror Z was not substantially impaired." *Id.* at 2227-28. The Supreme Court reversed, holding that the record established that Juror Z "had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case." *Id.* at 2226.

Here, the *voir dire* reveals that both veniremen expressed grave and considerable objections to the death penalty. The trial judge found that they could not properly serve as jurors because they could not fairly consider the whole range of punishments. Based on a review of the transcript, this Court concludes the trial judge's assessment was sound. Certainly, it was not "an unreasonable determination of the facts in light of the evidence presented." The Kentucky Supreme

Court correctly decided this claim. Woodall is not entitled to the writ on this basis.

D. FAILURE TO STRIKE SIX VENIREMEN FOR CAUSE

Woodall argues that his federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated because six individuals were not removed from the jury panel for cause.

Woodall used peremptory challenges to strike three of the veniremen in question: Lana Conger [278], Joseph Sims [16], and Joe Clift [8]. The Magistrate Judge concluded that Woodall has no viable claim with respect to these veniremen because he used peremptory strikes to remove them from the panel. *See Ross v. Oklahoma*, 487 U.S. 81, 85-86 (1988); *United States v. Martinez-Salazar*, 528 U.S. at 315-16; *Wolfe v. Brigano*, 232 F.3d 499, 501-03 (6th Cir. 2000). The Court Adopts the Magistrate Judge's Report and Recommendation with respect to these three veniremen. No further analysis of this part of the claim is necessary.

While the Court agrees with the Magistrate Judge's ultimate conclusion with respect to the remaining three jurors, given the magnitude of this case, the Court concludes that some additional analysis is necessary to support the Court's decision to reject this part of the claim.

Woodall claims that juror Genia Morris [176] should have been stricken for cause because she indicated in

voir dire that she worked at the Mini Mart in Greenville where the victim was abducted. During *voir dire*, however, Ms. Morris clarified that she did not begin working at the Mini Mart until about seven months after Sarah Hansen's abduction, and that she only worked there for one month. TE 8 at 1079. Ms. Morris also 1) stated that she never specifically discussed the case with anyone; 2) denied knowing any of the individuals involved; 3) said that she had not formed an opinion about the case; and 4) indicated that she could consider the entire range of penalties.

The Kentucky Supreme Court rejected Woodall's claim with respect to Ms. Morris as follows:

> Juror No. 176 possessed no special knowledge that could have influenced other jurors. The argument that the juror was situationally impaired because she had worked at the mini-market for one month more than six months after the crime occurred is without merit. The juror specifically denied on *voir dire* that she knew one of the prosecution witnesses and there was no evidence to substantiate the claim by Woodall. The juror indicated on *voir dire* that any conversations she may have had with fellow workers at the mini-mart were of a general nature. There was no abuse of discretion in refusing to strike the juror for cause.

Woodall, 63 S.W.3d at 118-19 (internal citations omitted).

The Constitution does not require that jurors be ignorant of the facts and issues involved in a case so long as the jurors can lay aside any knowledge and render a fair verdict based on the evidence presented in court. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961). An intricate knowledge of the Mini Mart's layout and parking lot might have been relevant in determining guilt or innocence. In this case, however, Woodall admitted guilt. Thus, the sole task of this jury was to determine the appropriate punishment for Woodall's crimes. The Mini Mart's only relevance was to set the stage. It was irrelevant to the jury's ultimate decision. As to that decision, Ms. Morris indicated that she had not prejudged the case, did not know any of the individuals involved, and could render a verdict based solely on the evidence. Constitutionally, Woodall was entitled to nothing more.

Woodall claims that juror Kathryn Reynolds [94] should have been stricken for cause because she was impaired in her ability to consider the minimum penalty. The relevant portion of her *voir dire* is as follows:

> THE COURT: Would you be able to consider these penalties and not automatically vote for any of them, but wait until you heard the evidence and consider the entire range before you voted on a verdict?

MS. REYNOLDS: Yes.

DEFENSE COUNSEL: . . . First of all, are you opposed or for the death penalty?

MS. REYNOLDS: I'm for it.

DEFENSE COUNSEL: For the death penalty.

MS. REYNOLDS: Depending on the circumstances.

. . .

DEFENSE COUNSEL: Could you consider . . . in a case where you found intentional murder, do you have any personal beliefs or anything that could prevent or substantially impair you from considering imposing a sentence of twenty years with possibility of parole?

MS. REYNOLDS: I couldn't go with that.

DEFENSE COUNSEL: You couldn't go with that?

THE COURT: Okay. Let me ask you this. If you were instructed to consider that and you felt it was warranted under the evidence, could you consider it?

MS. REYNOLDS: Yes, if I knew what the evidence was, yeah.

. . .

MS. REYNOLDS: I don't know. I really don't. I can't--I think if someone has committed murder they need to pay for it. Is twenty years long enough? I don't know. Can they be rehabilitated in that period of time? I don't know.

DEFENSE COUNSEL: That would be something important--

MS. REYNOLDS: Yes, it would be very important.

DEFENSE COUNSEL: --for you to consider if he could be rehabilitated?

MS. REYNOLDS: Yes.

. . .

MS. REYNOLDS: When a person's life is at stake, I want to hear all the information, as much as I can possibly hear. You can't make any kind of determination without knowing everything I don't think.

TE 8 at 1115-25.

The Kentucky Supreme Court rejected this claim as follows:

> Juror No. 94. Woodall argues that the juror should have been struck for cause because she could not consider a minimum sentence. The record shows that the juror indicated on two different occasions that she could consider the entire range of penalties. In response to the trial judge's question of whether she could consider a twenty-year sentence if so instructed, she answered she could if it were supported by the evidence. Although a juror is disqualified if he or she cannot consider the minimum penalty, excusal for cause is not required merely because the juror favors severe penalties, so long as he or she will consider the full range of penalties. *Per se* disqualification is not required merely because a juror does not instantly embrace every legal concept presented during *voir dire* examination.

Woodall, 63 S.W.3d at 118-19 (internal citations omitted).

"A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either

aggravating or mitigating circumstances is entirely irrelevant to such a juror." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). This is not the case with Ms. Reynolds. She unequivocally stated that she could consider the minimum sentence if she felt it was warranted by the evidence. She further indicated that before imposing the death sentence she would "want to hear all the information, as much as I can possibly hear." The record supports the Kentucky Supreme Court's conclusion that Ms. Reynolds was able to fairly consider mitigating and aggravating circumstances as well as the entire range of penalties.

Finally, Woodall claims that juror Noah Miller [185] should have been stricken for cause because he allegedly did not understand the *voir dire* questions. The relevant portion of his *voir dire* is as follows:

> DEFENSE COUNSEL: The Judge talked with you a little about aggravation and mitigation. Do you know what he means by mitigation?
>
> MR. MILLER: No[t] really.
>
> DEFENSE COUNSEL: Okay. Well, I'm not sure I really know, but here is what I use. I know its unclear when they just confine it to terms like that, but when we talk about mitigation--when I do, it's a fact or an event or evidence that may make you want to punish someone less severely. Okay. Now, self-defense,

insanity, those type of things aren't mitigation. Those are defenses. That's not what I'm talking about. Okay. Am I being clear here?

MR. MILLER: Yes, I believe so.

DEFENSE COUNSEL: Mitigation would be things like a low I.Q., mental illness, whether intoxicated are a few things that are in the statute. Would those types of things, would they be important to you in considering to reach a decision on how to punish someone or would they just not matter to a hill of beans?

MR. MILLER: Well, part of it might be.

DEFENSE COUNSEL: Which part?

MR. MILLER: On deciding on--on the stability about it.

DEFENSE COUNSEL: On the what?

MR. MILLER: The stability about it--the person.

DEFENSE COUNSEL: The stability of someone. Okay. That would matter to you?

Mr. MILLER: I believe so.

> DEFENSE COUNSEL: You think so. Are you sure?
>
> MR. MILLER: Yes.

TE 7 at 942-51.

The Kentucky Supreme Court rejected this claim as follows:

> Woodall claims that Juror No. 185 should have been excused for cause pursuant to KRS 29A.080(2)(d) because he had an insufficient knowledge of the English language and was unable to understand what was being said in *voir dire*. Woodall also argues that the juror never indicated whether he could consider an I.Q. of 74 of Woodall as a mitigating factor. No. 185 sat as a juror. He stated on two separate occasions that he could consider mitigating evidence and follow the instructions of the trial judge on mitigating evidence. During *voir dire*, the juror stated he could consider someone's stability as a mitigating circumstance. There was no abuse of discretion in denying the motion to strike for cause.

Woodall, 63 S.W.3d at 118-19 (internal citations omitted).

The Court has reviewed Mr. Miller's entire *voir dire*. He appeared to understand the questions, and his answers were appropriate and responsive. The Kentucky Supreme Court's determination with respect to Mr. Miller was not unreasonable.

In sum, the Kentucky state courts' decisions about these jurors' impartiality are not unreasonable determinations in light of the record; nor are they contrary to or an unreasonable application of established federal law. Woodall is not entitled to relief under claim four.

E. UNANIMITY IN THE JURY INSTRUCTIONS

Woodall argues that the sentencing instructions improperly led the jurors to believe that they had to unanimously find any mitigating circumstance and did not specifically instruct them otherwise. Although no direct instruction was given requiring that the jurors find the existence of each mitigating factor unanimously, Woodall asserts that the jurors were repeatedly instructed that their decisions had to be unanimous, but were not instructed that they did not have to be unanimous as to the existence of any particular mitigating factor.

The relevant portions of the jury instructions are as follows:

> Instruction No. 1
>
> In considering such evidence that may be unfavorable to the Defendant, you will

presume the Defendant innocent of these aggravating circumstance or circumstances unless you believe from the evidence that the aggravating circumstance or circumstances exist beyond a reasonable doubt.

Instruction No. 2

In fixing the punishment for the offense of Murder, you shall consider one or both of the following aggravating circumstance or circumstances which you may believe from the evidence beyond a reasonable doubt to be true

. . .

Instruction No. 4

In fixing the sentence of the Defendant for the offense of Murder, you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true including but not limited to such of the following as you believe to be true . . .

Instruction No. 5

But you cannot fix the sentence at death, or at confinement in the

penitentiary without benefit of probation or parole, or life in the penitentiary without benefit of probation or parole, or life in the penitentiary without the benefit or probation or parole until he has served a minimum of twenty-five years of his sentence, unless you are satisfied from the evidence beyond a reasonable doubt that one or both of the aggravating circumstance or circumstances listed in Instruction No. 2 are true in their entirety, in which event you must state in writing, signed by the Foreperson, that you find the aggravating circumstance or circumstances to be true beyond a reasonable doubt.

Instruction No. 6

If you have reasonable doubt as to the truth or existence of one or both of the aggravating circumstance or circumstances listed in Instruction No. 2, you shall not make any finding with respect to it.

If upon the whole case you have reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.

Instruction No. 7

> The verdict of the jury must be in writing, must be unanimous, and must be signed by one of you as Foreperson.

TR at 1136-48.

The Kentucky Supreme Court rejected this claim as follows:

> Woodall claims that the trial court submitted an instruction that required the jury to find mitigating circumstances unanimously and beyond a reasonable doubt. He contends that the jury instructions, when read as a whole and given their common sense meaning, lead to a conclusion that the entire jury had to be unanimous. We find such argument unconvincing. This Court has repeatedly indicated that an instruction on unanimous findings on mitigation is not required. [] This situation does not violate the doctrine set out in *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), because there was no requirement the jurors unanimously reach a conclusion regarding any mitigating factor. Each individual juror was free to examine and react to any mitigating factor when determining the appropriate sentence. Any juror who found a mitigating factor could use that

> fact to prevent the unanimous sentence of death.

Woodall, 63 S.W.3d at 125-26.

The Court agrees with the Magistrate Judge that the writ should not issue on this basis, but finds that additional analysis is necessary. Furthermore, given the disagreement in Sixth Circuit case law on this issue, the Court concludes that a certificate of appealability should issue with respect to this claim.

It is unconstitutional for a state to require jurors to unanimously agree on mitigators. *See McKoy v. North Carolina*, 494 U.S. 433 (1990). However, the Constitution does not require a state to adopt specific standards for instructing the jury in its consideration of mitigating factors under a death penalty scheme. *Zant v. Stephens*, 462 U.S. 862, 884-91 (1983). Kentucky has chosen not to require the trial judge to instruct the jury that its findings on the existence of any particular mitigating factor does not have to be unanimous. *Stopher v. Commonwealth*, 57 S.W.3d 787, 803 (Ky. 2001); *Tamme v. Commonwealth*, 973 S.W.2d 13, 37 (Ky. 1998). Still, regardless of state law requirements, the Constitution forbids the instructions from being structured in such a way as to imply that mitigation must be found unanimously. *See Abdur'Rahman v. Bell*, 226 F.3d 696, 711 (6th Cir. 2000) (citing *Mills v. Maryland*, 486 U.S. 367 (1988)).

The standard for reviewing a claim that a sentencing instruction is ambiguous is "whether there is a

reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 379-80 (1990). This "reasonable likelihood" standard does not require the defendant to prove that the jury "more likely than not" interpreted the challenged instruction in an impermissible way; however, he must demonstrate more than "only a possibility" of an impermissible interpretation. *Id.*

The Sixth Circuit considered a set of instructions similar to the instructions given to Woodall's jury in *Come v. Bell*, 161 F.3d 320, 336-39 (6th Cir. 1998). In *Come*, the Sixth Circuit held that the following jury instruction did not violate the Eighth Amendment as interpreted in *Mills v. Maryland*: "If you unanimously determine that at least one statutory aggravating circumstance or . . . circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death." *Come v. Bell*, 161 F.3d at 336. In so holding, the Sixth Circuit rejected the petitioner's argument that the instruction improperly implied that a jury must unanimously find the existence of a mitigating factor before any juror could consider that factor. *Id.* at 338. The petitioner had argued that the instruction did so by expressly stating that the jury must make a unanimous determination as to each aggravating factor while simultaneously remaining silent as to whether a mitigating factor need be unanimously found. *See id.* at 336-38. Likewise, in *Kordenbrock v. Scroggy*, 919 F.2d

1091, 1120-21 (6th Cir. 1990), Judge Kennedy writing for the majority of the Court on this issue explained: "The instructions carefully stated that finding an aggravating factor required such agreement, but it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement. Indeed it would indicate the opposite." *Id.*

The instructions in Woodall's case do not differ in substance from those in *Come* and *Kordenbrock* with respect to mitigators.[3] Additionally, the Court observes that the verdict form in Woodall's case required the jury to set out in writing, signed by the foreperson, the aggravating circumstance(s) they found before imposing the death sentence. However, the jury did not have to make any written findings with respect to mitigators. This suggests that each juror could individually consider the mitigators without having to unanimously agree.

Based on its review of the record and applicable case law, this Court concludes that the Kentucky Supreme Court's decision to reject this claim was not an unreasonable application of established federal law.

---

[3]In *Scott v. Mitchell*, 209 F.3d 854, 877 (6th Cir. Ohio 2000), the Sixth Circuit explained that its decision in *Come* on the unanimity is binding notwithstanding *dicta* in *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999), that suggests the contrary. *Id.* ("As we have explained, our *Come* decision, which well preceded *Mapes*, explicitly held that unanimity instructions like those in this case do not violate *Mills*. The *Mapes dicta* cannot preclude us from following *Come* in this case.").

However, given statements from the dissenting judges in *Kordenbrock* and the *dicta* in *Mapes*, the Court believes that reasonable jurists could find that the instructions impermissibly implied to the jurors that they had to unanimously agree on mitigators and that they applied them accordingly. Therefore, reasonable jurists could find the Court's analysis with respect to this claim to be debatable or wrong. Accordingly, the Court will grant a certificate of appealability with respect to this claim. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473 (2000).

F. ERRONEOUS VERDICT FORM

Woodall's sixth claim is that the verdict form was erroneous in that it prohibited the jury from considering the lowest two sentences because the only place on the verdict form to designate the finding of an aggregating circumstance was for a sentence of death, life without the possibility of parole, or life without the possibility of parole until he had served twenty-five years. Woodall claims this was misleading because under Kentucky law the jury could have agreed on the existence of an aggregating circumstance and still have sentenced Woodall to one of the two lesser sentences. In other words, finding the existence of aggravating circumstances permitted, but did not require, the jury to impose a heightened sentence. Again, while the Court agrees with the Magistrate Judge's ultimate conclusion that this claim does not merit issuance of the requested writ, it finds that additional analysis is necessary to support this conclusion.

The Kentucky Supreme Court rejected this claim as follows:

> The verdict form used in this case and a number of other cases does not constitute reversible error. Similar arguments have been rejected in *Hodge*, *Foley*, *Haight* and *Wilson v. Commonwealth*, Ky., 836 S.W.2d 872 (1992). Federal courts have also refused to grant relief. *See James v. Whitley*, 926 F.2d 1433 (5th Cir. 1991); *Flamer v. Delaware*, 68 F.3d 736 (3rd Cir. 1995).

Woodall, 63 S.W.3d at 133-34.

The verdict form must be considered in conjunction with the written instructions. *Slaughter v. Parker*, 450 F.3d 224, 241 (6th Cir. Ky. 2006) (citing *Cupp v. Naughten*, 414 U.S. 141, (1973)). The body of the instructions accurately apprised the jurors that even if they found the existence of an aggravating circumstance they were not required to impose one of the three enhanced sentences. The jury was instructed that it could fix Woodall's sentence anywhere from a minimum of twenty years in prison to a maximum of death. *See* TR at 1141. They were not instructed that the finding of one of the aggravating circumstances mandated that they choose one of the most severe punishments. When the verdict form is viewed in conjunction with the instructions, it is clear that Woodall's jury was instructed to consider the entire range of penalties irrespective of their decision on the

existence of an aggregating circumstance. The Kentucky Supreme Court did not erroneously apply the law in this regard.

In the alternative, the Court concludes that any error was harmless because the jury chose the most severe of the three penalties. "A constitutional error is harmless when 'it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Mitchell v. Esparza*, 540 U.S. at 17 (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)). Here, even if the jury thought that upon finding an aggregating circumstance it had to impose one of the three harshest penalties, the fact that it picked death, the harshest, implies that it would not have imposed one of the two more lenient alternatives even if it had believed them to be available. Had the jury imposed the least severe of the three, life without the possibility of parole until Woodall had served twenty-five years, the harmless error might be different because it could be argued that the jury might have gone with one of the two lesser sentences had it believed them available. Such an argument, however, cannot be made in this instance.

The Kentucky Supreme Court's decision to reject this claim was not an unreasonable application of federal law.

G. PROSECUTORIAL MISCONDUCT

Woodall's seventh claim is that the prosecutor's numerous allegedly improper and prejudicial

comments during closing arguments denied Woodall a fair trial. Woodall specifically complains that the prosecutor improperly: 1) argued that Woodall's guilty plea was simply part of his defense "strategy"; 2) commented on Woodall's silence; 3) appealed to the jurors' sense of responsibility to the community; 4) extolled the goodness of the victim and included victim impact arguments regarding the loss suffered by her family; 5) sensationalized the night of the crimes and labeled Woodall as "evil"; 6) went outside of the record to quote a book by John Walsh about the evil of killers; and 7) misstated the law on mitigation.

The Magistrate Judge concluded that Woodall procedurally defaulted these claims. This Court disagrees. The Kentucky Supreme Court merely "noted" that Woodall's counsel did not object to these portions of the closing. A close reading of the Kentucky Supreme Court's opinion reveals that while the failure to object was mentioned by the court, it did not actually rely on procedural default to support its decision. Instead, the Kentucky Supreme Court based its holding entirely on the merits. Because procedural default was only noted, and not relied on, by the Kentucky Supreme Court, this Court must substantively review the claims.[4] *Caver v. Straub*, 349 F.3d at 346.

"To be cognizable" on habeas review, prosecutorial misconduct "must have 'so infected the trial with

---

[4]In doing so, the Court has throughly reviewed the prosecutor's entire closing argument. TE 12 at 1601-23.

unfairness as to make the resulting conviction a denial of due process.'" *Gillard v. Mitchell*, 445 F.3d 883, 897 (6th Cir. 2006) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). In this respect, "'the touchstone of the due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor.'" *Serra v. Mich. Dep't of Corr.*, 4 F.3d 1348, 1355 (6th Cir. 1993) (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). If the court determines that a statement or action is improper, it must then weigh the following factors: "(1) whether the conduct or remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the conduct or remarks were deliberately or accidentally made; and (4) whether other evidence against the defendant was strong." *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001). "Claims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004).

1. Guilty plea being a defense strategy

During his closing argument the prosecutor made the following statement about Woodall's decision to plead guilty:

> [Y]ou've heard on and on how the defendant has pled guilty. Well ladies and gentlemen, don't think that I asked him to plead guilty. Don't think that I care if he pled guilty or not. So why did he plead guilty? We've got somebody here through attorneys, through counsel, who has received a copy of each and every report that we had. It's called an open file. They got what we got. They got copies of all the evidence, all the reports, the DNA, the fingerprints. They got everything. Now, you heard the testimony -- when did this happen? Was this on January the 27th of 1997? Of course not. The defendant stood in this Court on April 10 of 1998 and pled guilty so that defense counsel can say . . . "Keith has pled guilty. He's admitted he's done wrong, so we're not here for that."

TE 12 at 1611-12.

It is permissible for a prosecutor to comment on defense strategy. *Slagle v. Bagley*, 457 F.3d 501, 522 (6th Cir. 2006). "Case law permits comments that are made in response 'to the argument and strategy of defense counsel.'" *Byrd v. Collins*, 209 F.3d 486, 535

(6th Cir. 2000) (quoting *Butler v. Rose*, 686 F.2d 1163, 1172 (6th Cir. 1982)). In *Byrd*, during the sentencing phase the petitioner made an unsworn statement to the jury in which he expressed some remorse, but did not actually admit the murder for which he had been convicted. In closing, the prosecutor called the statement "shallow" and implied that the defendant made it only to save himself from death. The Sixth Circuit held that the prosecutor's comments on this strategy were proper. *Id. See also United States v. Pedron*, No. 07-11269, 2008 U.S. App. LEXIS 11696 (11th Cir. Fla. May 30, 2008) (holding prosecutor's comment that defense was akin to a "grade school playground tactic" was a "valid remark on defense strategy," and did not amount to prosecutorial misconduct). The Supreme Court of Kentucky correctly applied federal law in rejecting this claim.

2. Commenting on Woodall's silence

Woodall argues that certain comments the prosecutor made about his demeanor during trial were an unconstitutional attack on his Fifth Amendment right to remain silent. The prosecutor made the following observation during his closing:

> You've heard everyone talk of their observations of the defendant. How many of those have told you that he's got a habit of sitting around looking down like this for a week at a time? Don't be fooled. Don't be fooled by that. That's not the defendant, Robert Keith Woodall.

TE 12 at 1612.

It is well established that a prosecutor's direct reference to a criminal defendant's failure to testify is a violation of the Fifth Amendment privilege against compelled self-incrimination. *Griffin v. California*, 380 U.S. at 609. Indirect references on the failure to testify also can violate the Fifth Amendment. *Byrd v. Collins*, 209 F.3d at 533. "When the alleged infringements consist of such references, 'a reviewing court must look at all the surrounding circumstances in determining whether or not there has been a constitutional violation.'" *Id.* (quoting *Butler v. Rose*, 686 F.2d 1163, 1170 (6th Cir. 1982)). The court must undertake a "probing analysis of the context of the comment." *United States v. Robinson*, 651 F.2d 1188, 1197 (6th Cir. 1981). This "probing analysis" entails the consideration of four factors:

> (1) Were the comments "manifestly intended" to reflect the accused's silence or of such a character that the jury would "naturally and necessarily" take them as such;
> (2) Were the remarks isolated or extensive;
> (3) Was the evidence of guilt otherwise overwhelming; [and]
> (4) What curative instructions were given, and when.

United States v. Moore, 917 F.2d 215, 225 (6th Cir. 1990) (quoting *Spalla v. Foltz*, 788 F.2d 400, 404-05 (6th Cir. 1986)).

The Kentucky Supreme Court reached the following conclusion about the prosecutor's statements: "The prosecutor was entitled to make a comment on the demeanor of Woodall in the courtroom. There was no objection to this comment and no prejudice resulted. It did not refer to a lack of remorse or silence or failure to testify." *Woodall*, 63 S.W.3d at 125. This conclusion is not an unreasonable application of established federal law. This Court agrees that the statements concerning Woodall were not manifestly intended to reflect on his failure to testify at trial, nor would the jury have understood the statements as such. *See e.g., Cunningham v. Perini*, 655 F.2d 98, 100 (6th Cir. 1981) (holding that comment that defendant just sat and stared during trial did not run afoul of the Fifth Amendment); *Bates v. Lee*, 308 F.3d 411, 421 (4th Cir. 2002) ("This court has found that prosecutorial comments about the lack of remorse demonstrated by a defendant's demeanor during trial do not violate a defendant's Fifth Amendment right not to testify.").

3. Appealing to jury's sense of community

During the closing argument the prosecutor appealed the jury's sense of community:

> Your verdict--simple word isn't it, your verdict, but your verdict, ladies and gentlemen, is more than just your verdict.

> You are the representatives of Caldwell County. You are the representatives of Muhlenberg County. You are the representatives of each citizen of this State. Criminal law is a lot like, I feel, a contract or an agreement between our various citizens, because we have a large number of people when a criminal trial occurs chosen representatives, jurors are picked, are selected, to hear evidence and return a verdict, and all of us who you represent rely upon you to do your job, to return in every case and in this case a true verdict.

TE 12 at 1602. Woodall claims that the prosecutor improperly argued that the jury should impose the death penalty in order to fulfill its societal duty. The Kentucky Supreme Court rejected this argument: "The prosecutor did not improperly appeal to the jury's sense of responsibility to the community. A prosecutor may call on a jury to do its duty. *Woodall*, 63 S.W.3d at 124 (citing *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1988)).

The Kentucky Supreme Court's rejection of this claim was not a unreasonable application of federal law. The Sixth Circuit has noted that "unless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not *per se* impermissible." *United States v. Solivan*, 937 F.2d 1146, 1151 (6th Cir. 1991). In

Solivan, the prosecutor urged the jury to convict the defendant of drug charges in order to send a message to all drug dealers that they were not welcome in the community. On direct appeal, under its supervisory powers, the Sixth Circuit held that the argument constituted reversible error. Woodall's case must be examined under the more stringent habeas review standards. Additionally, the argument complained of does not ask the jury to send a message to other potential murderers or rapists. Woodall's prosecutor asked the jury to impose a verdict of death as the appropriate punishment for the crimes Woodall committed. In so doing, the prosecutor urged the jury to weigh all the aggravating circumstances against the mitigating factors. In *Byrd v. Collins*, 209 F.3d at 539, the Sixth Circuit held that such arguments do not constitute a violation of due process on habeas review. *Id.*

4. Victim impact evidence

In his closing, the prosecutor spoke of the victim as "pure goodness" and briefly discussed the impact the crime had on her family. Woodall argues that statements such as these deprived him of a fair trial. The Kentucky Supreme Court rejected Woodall's argument.

> The Commonwealth may portray the reality of the violence, giving some background and information regarding the victim in order to give a full understanding of the nature of the crime.

> In a concurring opinion, it has been stated that a prosecutor can provide the fact finder with a quick glimpse of the life the criminal chose to end so as to remind the jury that the victim was a unique human being. *Payne v. Tennessee*, 501 U.S. 808 (1991). We agree. We have found no error in bringing to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community. *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519 (1984). The references to the victim and her family did not in any way deprive Woodall of a fair and impartial trial. Victim impact evidence is another method of informing the sentencing authority about the specific harm caused by the crime. *Payne, supra*

Woodall, 63 S.W.3d at 124.

The Kentucky Supreme Court correctly applied federal law. In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court held as follows:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the

> murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Id. at 827. Kentucky law permits reference to victim impact evidence. *See McQueen v. Commonwealth*, 669 S.W.2d 519, 523 (Ky. 1984) ("[W]e find no error in bringing to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community."). There was no constitutional violation.

5. Describing the night as horror and terror filled and calling Woodall "evil"

In *Darden v. Wainright*, 477 U.S. 168, 180-82 (1996), the United States Supreme Court considered comments far more sensational than the remarks currently at issue. The prosecutor in Darden called the defendant an "animal," stated that the death penalty was the only way to adequately protect the public, and intimated that society would have been better off if the defendant had just killed himself. *Id.* In evaluating whether the remarks entitled the defendant to habeas relief the Court first observed that "the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. at 642). The Court then

concluded that the remarks while improper, did not deprive the defendant of a fundamentally fair trial.

Under Kentucky law, it is proper for counsel to make reasonable inferences from the evidence during closing arguments. See *Richards v. Commonwealth*, 517 S.W.2d 237, 242 (Ky. 1974). From the evidence presented at trial, it is clear that for the victim the night was a terrible horror filled ordeal that culminated in her death. She was kidnapped by a stranger, her head was nearly severed, she was brutally raped, drug naked in the dark across the freezing ground, and tossed in an icy lake where she drowned. The night was horrific and the victim no doubt was filled with terror as these terrible events unfolded. The evidence would have supported even a far more graphic closing than the one delivered by the prosecutor. The prosecutor did not engage in any misconduct in his description of the events and crime.

The Court now turns to the prosecutor's description of Woodall as evil. The acts Woodall committed were evil. There is no question about that. However, a prosecutor should refrain from "gratuitous insults" of the defendant. *See Byrd v. Collins*, 209 F.3d at 536. Although improper, the prosecutor's use of the term "evil" did not deprive Woodall of a fundamentally fair trial. As a whole the closing was above board, the evidence in favor of the death penalty was strong, and there is nothing to suggest that the jury was mislead by the statement. As such, Woodall is not entitled to habeas relief on this claim. *United States v. Carter*, 236 F.3d at 783.

6. Discussing Book in Closing

During his closing, the prosecutor discussed a book by John Walsh. The book described the belief that there is such a thing as pure evil. Its unclear to this Court exactly what the prosecutor was attempting to accomplish in discussing the book. The most logical explanation, however, is that he was attempting to group Woodall among those described in book as concerned only with fulfilling their desires no matter the impact on the rest of society. After reviewing the portion of the closing at issue, the Court concludes that the prosecutor's comments were within the permissible range of rhetoric employed in closing argument and did not affect the fairness of the trial. They did not lead to a miscarriage of justice authorizing habeas relief. The jury could have inferred from the evidence alone that on the night in question Woodall was concerned only with self-gratification and displayed no concern for the fear he instilled in his victim or the pain he inflicted on her before her death.

7. Misstated law on mitigation

Woodall claims that he was denied a fundamentally fair trial because the prosecutor misstated the law as it pertains to mitigation. During his closing, the prosecutor made the following argument concerning mitigation:

> Mitigating circumstances-- let's talk about that a minute. The Court has told you, and it's in there, that the mitigating

> circumstances are two. Let me take the second one first. For you to consider the youth of the defendant at the time of the crime . . . The only other mitigator for you to consider here is if at the time of the offense committed by the defendant he didn't have the capacity, the ability to appreciate the criminality of the requirements of law and was impaired as a result of mental illness or retardation.

TE 12 at 1615.

The jury instructions regarding mitigation stated:

> In fixing the sentence of a defendant for the offense of murder, you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true including but not limited to such of the following you believe from the evidence to be true:
>
> 1. At the time of the offenses committed by the Defendant, the capacity of the Defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of the law was impaired as a result of mental illness or retardation, even though the impairment of the capacity of the Defendant to appreciate the criminality of

> his conduct or to conform the conduct to the requirements of the law is insufficient to constitute a defense to the crime.
>
> 2. The youth of the defendant at the time of the crime.

TR at 1140.

It is improper for the prosecutor to misstate the law to the jury. *See United States v. Berry*, 627 F.2d 193, 200 (9th Cir. 1980); *United States v. Hammond*, 642 F.2d 248, 249-50 (8th Cir. 1981). To obtain relief, however, a petitioner must show that: 1) the prosecutor in fact misstated the law; and 2) the misstatement rendered the trial fundamentally unfair. *Dobbs v. Kemp*, 790 F.2d 1499, 1504 (11th Cir. 1986), *modified in other part*, 809 F.2d 750 (11th Cir.), *cert. den.*, 481 U.S. 1059 (1987) (holding that prosecutor's misstatement of law did not render trial fundamentally unfair given the obscurity of the improper implication, the clear instructions by the trial judge, and the overwhelming evidence of guilt). A misstatement is harmless if the court properly instructs the jury on that point of law or instructs that the attorneys' statements and arguments are not evidence. *Bland v. Sirmons*, 459 F.3d 999, 1016 (10th Cir. 2006).

In this case, Woodall claims that the prosecutor's remarks were improper because "he totally omitted the second half of the instructions . . . requiring the jury to consider Petitioner's mental illness and retardation even if resulting impairment of his capacity to

appreciate the criminality of his conduct or conform his conduct to the requirements of the law was insufficient to constitute a defense of the crime." Pet. at 40. At most, the prosecutor can be faulted for selectively quoting the jury instructions. His did not, however, affirmatively misstate the law. Even if he had, any error would be harmless because the jury was properly instructed by the trial court on the law of mitigation. There is no evidence in the record that the jury did not follow the written instructions. And, the jury is presumed to follow its instructions, *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000), even when there has been misleading argument. *See Boyde v. California*, 494 at 384 (explaining that "arguments of counsel generally carry less weight with a jury than do instructions from the court").

In conclusion, the Court cannot say that the Kentucky Supreme Court's decision to reject Woodall's prosecutorial misconduct claims was contrary to, or involved an unreasonable application of, clearly established federal law, as reflected in the decisions of the United States Supreme Court.

H. RESTRICTIONS ON VOIR DIRE

Woodall's eighth claim of error is that the trial court impermissibly curtailed his ability to ask relevant *voir dire* questions. Specifically, Woodall claims that he should have been allowed to ask potential jurors about 1) whether they would consider evidence of his borderline mental retardation; 2) their feelings

concerning Woodall's right to remain silent; 3) the fact that the jury did not have to be unanimous on mitigating factors; and 4) the fact that mitigating circumstances did not have to be proven beyond a reasonable doubt. The Kentucky Supreme Court held that the trial court conducted an adequate *voir dire* examination that allowed the seating of a fair and impartial jury. *Woodall*, 63 S.W.3d at 116.

The Court agrees with the Magistrate Judge's ultimate conclusion that this claim does not warrant issuance of the requested writ. Upon review, however, the Court concludes that additional analysis is needed to support this conclusion.

"The Supreme Court has consistently 'stressed the wide discretion granted to the trial court in conducting *voir dire* . . . in . . . areas of inquiry that might tend to show juror bias." *Beuke v. Houk*, 537 F.3d 618, 637 (6th Cir. 2008) (quoting *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991)). "In the context of *voir dire*, the trial court violates the defendant's constitutional rights only when it restricts a "constitutionally compelled" question. *Id.* "To be constitutionally compelled . . . it is not enough that such [*voir dire*] questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Mu'Min v. Virginia*, 500 U.S. at 425-26. The Constitution does not dictate a particular *voir dire* process; it demands only that the process be "adequate . . . to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. at 729 ("The Constitution . . . does not dictate a catechism for *voir dire*, but only that the defendant

be afforded an impartial jury."). To be adequate, *voir dire* need not establish juror partiality with "unmistakable clarity." *Wainwright v. Witt*, 469 U.S. at 424 (internal quotation marks omitted). It must only be sufficient to permit a trial judge to form "a definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 426.

In his objections, Woodall complains that the Magistrate Judge did not "consider, distinguish or address" a Sixth Circuit case, *United States v. Blount*, 479 F.2d 650 (6th Cir. 1973), and its progeny. In *Blount*, a Sixth Circuit panel held that it was reversible error for the district court to refuse to ask prospective jurors during *voir dire* if "they could accept the proposition of law that a defendant is presumed innocent, has no burden to establish his innocence, and is clothed throughout the trial with this presumption." *Id.* at 651. "The Sixth Circuit has refused, however, to extend the holding of *Blount* to any other areas of inquiry and later held, in *United States v. Aloi*, 9 F.3d 438 (6th Cir. 1993), that the district court's refusal to question prospective jurors concerning a defendant's right not to testify was not a reversible abuse of discretion." *United States v. Hernandez*, 232 F. App'x 561, 565 (6th Cir. 2007).

This Court has reviewed the entire *voir dire*. After doing so, it has concluded that defense counsel were given enough latitude in questioning to seat an impartial jury. While Woodall might have desired more specific inquiry into areas such as his mental infirmity, the trial court allowed enough questioning for

Woodall's counsel to select an impartial jury. Even in this area, Woodall was not completely shut down. His counsel were allowed to ask the potential jurors if they "could consider the mental condition of the defendant at the time of the offense." TE 5 at 670.

The Kentucky Supreme Court's resolution of this claim was not contrary to or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; nor did it result from an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

I. USE OF STATEMENTS IN SEX OFFENDER EVALUATION

Woodall's ninth claim is that the trial court's use of statements Woodall made during a sex offender evaluation was unconstitutional. The Court adopts the Magistrate Judge's Report and Recommendation with respect to this claim. No further analysis is necessary.

J. VOLUNTARINESS OF WOODALL'S GUILTY PLEA

Woodall's tenth claim for relief is that his guilty plea was not knowing and voluntary. The relevant portions of Woodall's guilty plea are as follows:

> THE COURT: Mr. Woodall on the 18th day of March of 1997 the Muhlenberg County Grand Jury returned an

indictment against you charging you with three counts of felonies. On committed is the capital offense of murder, two charging you with the capital offense of kidnapping, also thirdly, a first degree rape was the third count. You subsequent to that entered a not guilty plea to that--those charges. However, today the Court has been handed a motion to enter a guilty plea, and I understand it is a conditional plea, and I'll ask you--it looks like it's been signed by you. I'll ask you is that your signature.

DEFENDANT: Yes sir.

THE COURT: Okay. Mr. Williams [defense counsel], I understand that the defendant is wishing to enter a conditional plea. Is that correct?

MR. WILLIAMS: That's correct Judge.

. . .

THE COURT: Okay. Would you raise your right hand please? Do you swear or affirm the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help y u God?

THE DEFENDANT: Yes sir.

THE COURT: State your name for the record, please.

THE DEFENDANT: Robert Keith Woodall.

THE COURT: And Mr. Woodall, what's your date of birth?

THE DEFENDANT: 3-19-74.

THE COURT: And subject to the--excuse me. Let me ask you this. How much education do you have?

THE DEFENDANT: I finished the 11th grade.

THE COURT: You can lower your hand. Subject to the pretrial motions you filed in this case, have you ever suffered from a mental disease or defect or do you now suffer from a mental disease or defect.

THE DEFENDANT: Not that I know of.

THE COURT: And have you talked with Mr. Williams about this guilty plea?

THE DEFENDANT: Yes Sir.

THE COURT: Have you had all the time you need to talk to him about it?

THE DEFENDANT: Yes Sir.

THE COURT: Do you have any complaints about the
legal advice given to you by Mr. Williams and Mr. Baker?

THE DEFENDANT: No Sir.

THE COURT: Are you fully satisfied with the job they've done for you?

THE DEFENDANT: Yes Sir.

THE COURT: Did you read and understand this motion to enter a guilty plea before you signed it?

THE DEFENDANT: Yes Sir.

THE COURT: And did you sign it voluntarily of your own free will and accord?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand, Mr. Woodall, what facts the Commonwealth would have to prove beyond a reasonable doubt to be convicted of these offenses?

THE DEFENDANT: Yes sir.

THE COURT: And did you on or about January 25th, 1997, in Muhlenberg County commit the capital offense of murder by cutting Sarah Hansen with a sharp object and drowning her, and this murder was committed while engaged in the offense of rape in the first degree?

THE DEFENDANT: Yes sir.

THE COURT: And did you on January 25th, 1997, in Muhlenberg County, Kentucky, commit the capital offense of kidnapping Sarah Hansen in which she was not released alive?

THE DEFENDANT: Yes sir.

THE COURT: And did you on January 25th, 1997, in Muhlenberg County, Kentucky, commit the offense of first degree rape by engaging in sexual intercourse with Sarah Hansen through the use of forcible compulsion in which she received serious physical injury and death?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand, Mr. Woodall, you have the following rights? You have the right to a trial by jury in which the Commonwealth has to prove

these facts beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand you have the right during that trial to cross examine and confront witnesses that might be called to testify against you?

THE DEFENDANT: Yes sir.

THE COURT: You have a right to compel the attendance of witnesses you might want to be brought in to testify in your behalf. Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: You have a right to have a lawyer appointed for you not only at the trial, as you have had in this case, but also on appeal if you're convicted. Do you understand you have that right?

THE DEFENDANT: Yes sir.

THE COURT: More importantly, do you understand you have a right against self-incrimination, which means that you don't have to say anything and that the Commonwealth would have to prove you guilty beyond a reasonable doubt?

THE DEFENDANT: Yes sir.

THE COURT: Do yo understand you have that right?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand you waive or give up all those rights by pleading guilty?

THE DEFENDANT: Yes sir.

THE COURT: And do you understand furthermore in this case, Mr. Woodall, what the penalty range is that could be imposed upon you for these offenses?

THE DEFENDANT: Yes sir.

THE COURT: Do you understand that based upon your plea that your sentence could be set upon this case upon this indictment on two of the offenses at least a penalty for from twenty years to life, the other option would be life without the benefit of parole for 25 years or straight life, and fourthly, the death penalty could be imposed based upon your guilty plea. Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: And you've discussed this with your attorney and understand these– this range and the fact that the death penalty is an option in this case. Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: And you've discussed that with your attorney?

THE DEFENDANT: Yes sir.

. . .

THE COURT: Okay, Mr. Woodall, based upon these rights that I've given to you, is it still your desire to waive these rights . . . and go ahead and enter this plea to these offenses knowing what the full range of penalties are and which includes a maximum penalty of death . . . and enter your plea to this--these charges this afternoon?

THE DEFENDANT: Yes sir.

THE COURT: And do you plead guilty freely, voluntarily, of your own free will and accord?

THE DEFENDANT: Yes sir.

THE COURT: Has anybody for the Commonwealth or otherwise made you any offers of reward or anything to cause you to want to plead guilty?

THE DEFENDANT: No sir.

THE COURT: Anybody done anything to try to coerce or force you to plead guilty?

THE DEFENDANT: No sir.

THE COURT: Do you plead guilty voluntarily, intelligently, of your own free will and accord?

THE DEFENDANT: Yes sir.

THE COURT: Knowing these rights that the Court has given to you, is it still your desire to waive or give up those rights and go ahead and enter this plea of guilty to count--one count of murder while in the commission of rape in the first degree, a capital offense kidnapping when the victim was not released alive and for rape in the first degree, and want to go ahead and enter a plea to those three counts?

THE DEFENDANT: Yes sir.

> THE COURT: Mr. Williams, have you discussed this case, and I'm sure you have, fully with Mr. Woodall?
>
> Mr. WILLIAMS: Yes, Judge, I have to the extent that I've been able to.
>
> THE COURT: Do you feel like he understands his rights and the nature of these proceedings?
>
> MR. WILLIAMS: He understands his rights and the nature of these proceedings.
>
> THE COURT: Is his plea consistent with your advice and based on your consultations with him, do you believe it's made voluntarily, intelligently, of his own free will?
>
> Mr. WILLIAMS: Yes, Judge, I believe so.

TE 3 at 405-21.

The Kentucky Supreme Court disposed of this claim as follows:

> Woodall claims that his guilty plea was invalid because it was not a knowing, voluntary and intelligent waiver of his constitutional rights. He states that the plea was not entered voluntarily because

of his low intelligence and the impairment of counsel and that he did not understand that he would be waiving his Fifth Amendment privilege by pleading guilty and finally that the trial judge did not adequately establish the factual basis for the plea. He concedes that this issue is unpreserved.

Woodall specifically answered the questions of the court regarding the voluntariness of the plea in the affirmative on three different occasions. It is clear that Woodall understood all the consequences of his plea. Counsel made it clear that he had discussed the case with the defendant and he stated that he believed the plea to be voluntary. As stated in *Kotas v. Commonwealth*, Ky., 565 S.W.2d 445 (1978), citing *Brady v. United States*, 397 U.S. 742 (1970), the validity of a guilty plea is determined not by reference to some magic words but from the totality of the circumstances surrounding it. Here, there was the necessary affirmative showing in the record that the plea was intelligently and voluntarily made as required by *Boykin v. Alabama*, 395 U.S. 238 (1969), and noted in *Sparks v. Commonwealth*, 721 S.W.2d 726 (1986).

> There is no convincing evidence that defense counsel was impaired when he advised Woodall to plead guilty. There is a letter from counsel's physician stating that the lawyer was physically and emotionally exhausted but that was almost two months before the plea was entered. There was no indication that counsel was impaired during the plea colloquy, nor was health ever raised as an issue during the proceedings. The plea was properly accepted by the trial judge.
>
> The claim by Woodall that he was not informed of the effect of the guilty plea is without merit. The defendant was fully informed of his rights by the trial judge. There is nothing in the record to indicate that he did not have a full and complete understanding of his rights and that he voluntarily chose to plead guilty. The record indicates that the trial judge carefully explained the factual basis for each charge against Woodall who then admitted his guilt as to all charges. The procedure followed the requirements of *Henderson v. Morgan*, 426 U.S. 637 (1976).

Woodall, 62 S.W. 3d. at 131-32.

The Magistrate Judge concluded that this Court was barred from reviewing this claim because it was

procedurally defaulted. A federal habeas court is precluded from reviewing a state court judgment only if it determines that the "judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). While the Kentucky Supreme Court noted that this claim was "unpreserved," a through reading of the state court opinion indicates that procedural default was not "actually enforced" by the state court, and therefore, did serve as "an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim." *Maupin v. Smith*, 785 F.2d at 138. Thus, because the state court merely mentioned, but did not actually rest, its decision on procedural default, the Magistrate Judge's reliance on procedural default is improper in this instance. *See, e.g., Bowling v. Parker*, 344 F.3d 487, 498 (6th Cir. 2003) (holding that procedural default did not preclude review of claim on habeas because "the Kentucky Supreme Court in its opinion reveals that it did not clearly rely on Bowling's procedural default to dismiss the claims raised in his supplemental motion."). Therefore, this Court must evaluate the substance of the Kentucky Supreme Court's rejection of this claim under the AEDPA standards.

"While the court taking a defendant's plea is responsible for ensuring 'a record adequate for any review that may be later sought,' *Boykin v. Alabama*, 395 U.S. 238, 244 (1969), we have never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the

constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). In this case, the record indicates that Woodall was aware of the nature of the offenses to which he pled guilty and the consequences of his decision to do so. Furthermore, based on the record, it is entirely reasonable to conclude that the Woodall's plea was voluntary.

Additionally, the Court observes that given the magnitude of evidence against Woodall and the brutality of the crime, counsel's recommendation that Woodall plead guilty was a sound one. The Court ordered Woodall to be evaluated by an independent expert, Dr. Richard Johnson. Based on Dr. Johnson's evaluation of Woodall, there did not appear to be any defenses available that would have more likely than not led to a not guilty verdict. Counsel made a reasoned and sound judgment to recommend that Woodall plead guilty and hope that the jury would show mercy in its sentencing.

The Kentucky Supreme Court's resolution of this claim was not contrary to or an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; nor did it result from an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

J. TRIAL COURT'S REFUSAL TO GRANT WOODALL'S THIRD REQUEST FOR A CONTINUANCE

Woodall's eleventh claim is that the trial judge's refusal to grant a third continuance in June 1998 infringed on Woodall's Sixth Amendment right to a fair trial. The Court adopts the Magistrate Judge's Report and Recommendation with respect to this claim. The Court also observes that "when a continuance is denied, the defendant must demonstrate actual prejudice resulting from the denial. He must demonstrate that a continuance would have made relevant witnesses available or added something significant to the defense." *United States v. Conteh*, 234 F. App'x 374, 385 (6th Cir. 2007). Woodall has failed in this respect. Any additional witnesses or testimony counsel would have been able to present with more time would have merely been cumulative to mitigation evidence presented by Woodall.

K. TRIAL COURT'S DENIAL OF FUNDING TO CONDUCT ADDITIONAL TESTING

Woodall's twelfth claim is that the trial judge abused his discretion by denying Woodall's motion for funding to conduct a positron emissions tomography (PET) scan and other psychological testing. The Court adopts the Magistrate Judge's Report and Recommendation with respect to this claim. The Court also points out that it has reviewed the entire transcript from the state court hearing on this issue. TE 3 at 303-425. Based on the testimony presented, the trial court made a reasonable

determination that additional psychological testimony was not reasonably necessary. This is not a case where Woodall was denied all testing. Independent testing was conducted by Dr. Johnson at state expense.[5] That

---

[5]This testing was quite extensive. As explained by Dr. Johnson,

> Mr. Woodall was admitted to KCPC on February the 3rd 1998, and he was discharged on February the 17th, 1998. So he was at our facility for roughly two weeks. That process of evaluation involves not only myself, but all of the professional staff as well as the support staff. In other words, when a person is admitted, they will have an admitting physical examination by a psychiatrist who is also certified as a neurologist. The psychiatric social worker will collect the background and he personal history information. The attending physician, one of the psychiatrists, will provide any kind of medical care, any kind of medication, if indicated, as well as offering an assessment of how the person is functioning, and then the psychologist will perform a battery of psychological tests. I perform and conduct my own psychological testing. Also, the person is being observed 24 hours a day by nurses and by correctional staff, so over a period of two weeks Mr. Woodall was seen by a number of individuals. I have access to all of the notes that they would enter into the file and would incorporate all of that information into the final report which was submitted to this Court.
>
> . . .
>
> The process is an extensive one where, as I've already commented, I will have access to the information collected by our social worker, so we'll

testing revealed that there was nothing present to suggest Woodall suffered from an organic brain impairment. While an indigent criminal defendant may be entitled to expert assistance, he is not entitled to funding to "expert shop" until he finds an expert willing to give him a diagnosis favorable to his defense. *See Lundgren v. Mitchell*, 440 F.3d 754, 773 n.6 (6th Cir. 2006) ("Even in capital cases, a defendant is entitled to only one qualified mental health expert at the expense of the state, even if the conclusions of that expert fail to favor the defense.") (citing *Ake v. Oklahoma*, 470 U.S. 68, 72 (1985)).

L. WOODALL'S ALLEGED INCOMPETENCY

Woodall claims that he was incompetent "to assist counsel in fashioning an appropriate mental health defense." Woodall also argues that he was "forced to

---

have the developmental history and personal history. In this particular case, I also received, as part of the Court order, school records and correctional records, and those -- an analysis of those were included in the written report. I also had interviews with Mr. Woodall talking about him and trying to understand him, as well as going through a rather extensive battery of tests that were designed to measure intelligence, educational skills, any indications of any kind of perceptual motor or neurological problems, personality tests.

TE 11 at 1519-22.

proceed in a collateral proceeding when he was incompetent."

The Kentucky Supreme Court resolved this claim as follows:

> Appellant's claims of error in failing to hold a competency hearing and in failing to find Appellant mentally retarded should have been raised on direct appeal . We note, however, the trial court, *sua sponte*, ordered a mental health evaluation of Appellant at Kentucky Correctional Psychiatric Center as a "precaution." Dr. Richard Johnson's evaluation revealed that Appellant was competent to stand trial, and there was no evidence of mental retardation. Furthermore, nothing in the record indicates Appellant is mentally retarded or is incompetent, and his allegations supporting this claim are speculative.

Woodall, 2005 WL 3131603 at *1.

The Magistrate Judge concluded that Woodall procedurally defaulted this claim. However, in its opinion, the Kentucky Supreme Court merely stated that the claim was not properly raised on direct appeal. It is unclear, however, that the Kentucky Supreme Court decided to reject the claim because of a procedural error. To preclude review by this Court, "there must be unambiguous state-court reliance on a procedural default." *Bowling*, 344 F.3d at 499. It is the

opinion of this Court that the Kentucky Supreme Court did not unambiguously rely on procedural default. While it noted the default, it did not clearly hold that procedural default was the basis of its rejection of the claim. Rather, a plausible interpretation of the opinion is that while the Kentucky Supreme Court noted the procedural default, it based its rejection of the claim entirely on the its substance. This Court must substantively review the claim. *Id.*

The trial court ordered an evaluation of Woodall's competency. Dr. Johnson concluded that Woodall was competent. Woodall has not presented this Court with any evidence that should have caused the trial court or Woodall's trial counsel to question the validity of this finding at the time of his trial. While Woodall claims that he was incompetent to assist in his own defense, the record suggests otherwise. Woodall appeared cooperative during Dr. Johnson's evaluation. He seemed to understand the questions and gave responsive answers during his plea. Moreover, none of Woodall's counsel have stated that Woodall was unable to provide them with information necessary to assist in their representation. The only evidence relied on by Woodall concerns a "mental breakdown" he suffered in 2002 after the Kentucky Supreme Court affirmed his death sentence. This fact is not evidence of incompetency at the time of trial. Rather, it suggests that Woodall experienced difficulty in coping with the reality of his impending execution.

Citing *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam), Woodall also suggests that the Court's failure

to conduct a competency hearing on collateral review has violated his due process rights. *Rees* involved an entirely different set of facts. In *Rees*, the petitioner's counsel filed a petition for certiorari with the United States Supreme Court seeking review of the dismissal of his habeas petition in the lower court. A month after the petition had been filed, the petitioner asked his counsel to withdraw it. The Supreme Court ordered a competency hearing before it disposed of the petition because competency to dispose of the habeas proceedings was directly at issue. Woodall has not made any credible showing that his competency is directly at issue in these habeas proceedings.

The Kentucky Supreme Court's resolution of this claim was not contrary to or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; nor did it result from an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

M. MENTAL RETARDATION

Woodall's fourteenth claim is that the trial judge erred in failing to find him mentally retarded. He argues that Dr. Johnson's assessment that he has an intelligence quota of 70 to 79 could place him within the five-point margin of error of being mentally retarded. He has also submitted the affidavit of his trial counsel in which she states that she thinks that she may have once seen something in Woodall's school records that indicates he had an I.Q. of 68. That report

has not been placed before the Court nor has Woodall chronicled any efforts he has taken to attempt to locate the report.

The Kentucky Supreme Court rejected this argument as follows:

> Appellant's claims of error in failing to hold a competency hearing and in failing to find Appellant mentally retarded should have been raised on direct appeal. We note, however, the trial court, *sua sponte*, ordered a mental health evaluation of Appellant at Kentucky Correctional Psychiatric Center as a "precaution." Dr. Richard Johnson's evaluation revealed that Appellant was competent to stand trial, and there was no evidence of mental retardation. Furthermore, nothing in the record indicates Appellant is mentally retarded or is incompetent, and his allegations supporting this claim are speculative.

Woodall, 2005 WL 3131603 at *1.

Because the Magistrate Judge found this claim was procedurally defaulted, he did not review it substantively. This Court finds the Kentucky Supreme Court's resolution of this claim ambiguous. While the Court stated that this claim should have been raised on direct appeal, it is unclear to this Court whether the Kentucky Supreme Court actually enforced the

procedural bar in this instance or simply pointed out that the claim should have been raised earlier. As such, this Court will review the claim on its merits. *Bowling v. Parker*, 344 F.3d at 499.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that the execution of the mentally retarded constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court acknowledged that disagreement will often arise "in determining which offenders are in fact retarded" and left to the states the task of defining mental retardation and "developing appropriate ways to enforce th[is] constitutional restriction." *Id.* at 317 (internal quotation marks omitted). Kentucky chose to adopt a bright-line test for identifying mentally retarded defendants. Kentucky Revised Statute *Id.*532.130(2) provides that a defendant with an intelligence quotient of seventy or below is considered "seriously mentally retarded." The statute itself does not reference a margin of error or provide for consideration of intelligence within a range. It is a bright-line rule. *Id.*

In *In re Bowling*, 422 F.3d 434, 437 (6th Cir. 2005), the Sixth Circuit rejected the same "margin of error" argument advanced by Woodall.

> Bowling argues that this court should not consider the absolute scores on these I.Q. tests, but instead apply a five-point margin of error. The five-point margin of error does place one of Bowling's

seventh-grade scores below the statutory cutoff. However, Bowling does not justify the five-point margin of error with any explanation nor does the margin of error appear to derive from any particular source. In addition, there is no indication that the psychologists who administered the I.Q. tests to Bowling would not have already considered the adequacy and accuracy of the testing mechanisms in calculating his scores or in using these instruments for evaluation in the first place. *See United States v. Roane*, 378 F.3d 382, 409 (4th Cir. 2004) (in rejecting the argument that defendant's I.Q score should be considered within the range for those with mental retardation because of I.Q. score variations, the court observed that the psychologist's care in calculating a score "belies the suggestion that [the psychologist's] analysis did not account for possible variations in his testing instrument").

Under either Kentucky law or *Atkins*, Bowling has failed to establish a prima facie case on his mental retardation claim. None of his I.Q. scores falls below the cutoff of 70 established by the Kentucky statute. Evidence that he has limitations in functioning does not show that he is mentally retarded; rather, these limitations are just as indicative of

> the other psychological disorders from which he suffers as they are of low level intellectual functioning. Thus, we deny Bowling's application.

Id.; *see also Green v. Johnson*, 515 F.3d 290, 300 (4th Cir. 2008) (holding that *Atkins* does not require a margin of error consideration). The Kentucky Supreme Court did not unreasonably apply *Atkins* in deciding that Woodall is not mentally retarded.

Additionally, Woodall has not presented any credible evidence of an intelligence score below 70. All he has put before this Court is an affidavit from his former trial counsel stating that she believes that she may have seen a score of 68 in his file. There is no explanation why that test cannot be located or what efforts Woodall has taken to locate it. Even if the report was located, however, it would not alter this Court's conclusion. At least three of the intelligence tests given to Woodall over the years place him at or above a score of 70. A single score below 70 would not automatically preclude execution. *See Woods v. Quarterman*, 493 F.3d 580, 584-87 (5th Cir. 2007) (holding that where the petitioner had four I.Q. scores above 70 and one score below 70, the state court was not unreasonable in concluding that the petitioner failed to prove that he suffered from subaverage intellectual functioning).

In sum, the state court's conclusion that Woodall failed to prove by a preponderance of the evidence that he is mentally retarded is not contrary to *Atkins*.

Woods can cite no materially indistinguishable case decided differently by the Supreme Court.

N. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In claims fifteen through twenty-three, Woodall argues that his trial counsel were ineffective. Specifically, he asserts that his trial counsel failed to: 1) request a competency hearing; 2) argue that Woodall is ineligible for the death penalty due to mental retardation; 3) properly advise Woodall on his guilty plea; 4) properly support their motion for a continuance; 5) utilize evidence of psychosis and disassociation; 6) investigate genetic predisposition to mental illness; 7) obtain additional neurological testing; 8) properly present evidence of Woodall's fecal incontinence; and 9) adequately explain the conditions of Woodall's upbringing.

The Court agrees with the Magistrate Judge that none of these claims merits issuance of a writ. However, additional analysis is necessary to support the Court's conclusion.

The Sixth Amendment guarantees a criminal defendant the assistance of an attorney whose performance ensures a fair trial and a reliable result. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). To prevail on an ineffective-assistance claim, a convicted defendant must prove that 1) counsel's performance was deficient, and 2) the deficiency was prejudicial to the defense. *Id.* at 687. To satisfy the

deficiency prong of the test, the defendant must prove that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michael v. Louisiana*, 350 U.S. 91, 101 (1955)). The reviewing court's assessment must consider the circumstances of the particular case at the time of the challenged conduct. *Id.* at 690.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91.

"[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 691. The standard for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the context of the imposition of the death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

Woodall's first argument is that his counsel should have requested a competency hearing. The Kentucky Supreme Court rejected this argument as follows.

> Woodall argues that his first counsel, Williams, performed incompetently when he failed to request a competency hearing. In affirming the denial of his RCr 11.42 motion, the Kentucky Supreme Court found the claim without merit: Appellant first argues trial counsel was ineffective for failing to request a competency hearing . . . As stated above, Dr Johnson found no evidence of incompetence . . . Consequently, failing to pursue these avenues of trial strategy is not ineffective assistance of counsel.

Woodall, 2005 WL 3131603 at *1.

The trial court *sua sponte* ordered Dr. Johnson, a psychologist at the Kentucky Correctional Psychiatric Center, to perform an evaluation of Woodall. Dr. Johnson evaluated Woodall from February 3, 1998, through February 17, 1998. Dr. Johnson found Woodall competent to stand trial and reported those findings back to the trial court and counsel.

Counsel cannot be held responsible for procuring a second expert simply because one expert reached a result that Woodall now asserts is inaccurate. *See Beans v. Black*, 757 F.2d 933, 936 (8th Cir. 1985) (holding that counsel's actions were not objectively unreasonable for failing to procure a second expert on petitioner's competence when first expert found petitioner competent to stand trial). It was reasonable for counsel to end his psychological inquiry of Woodall's competency with Dr. Johnson's conclusions. *Clark v. Mitchell*, 425 F.3d 270, 285-86 (6th Cir. 2005) ("It was not unreasonable for Clark's counsel, untrained in the field of mental health, to rely on the opinions of these professionals."); *Lewis v. Alexander*, 11 F.3d 1349, 1353 (6th Cir. 1993) (holding that an attorney's reliance on the evaluation of the defendant's medical records by a professional he knew and trusted was not a violation of the Sixth Amendment); *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995) (finding that defense counsel did not render ineffective assistance by not seeking a "second opinion" where counsel reasonably relied on the results of a psychological examination); *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) ("The mere fact that . . . counsel did not shop around for a psychiatrist willing to testify to the presence of more

elaborate or grave psychological disorders simply does not constitute ineffective assistance.").

Woodall next claims that his counsel performed deficiently in failing to argue that he is mentally retarded. The Kentucky Supreme Court resolved this claim as follows:

> Appellant first argues that trial counsel was ineffective for failing to request a competency hearing and failing to raise mental retardation as an issue. As stated above, Dr. Johnson found no evidence of incompetence or mental retardation. Consequently, failing to pursue these avenues of trial strategy is not ineffective assistance of counsel.

Woodall, 2005 WL 3131603 at *2-3.

Several intelligence tests placed Woodall's I.Q. at 70 or above. Specifically, Dr. Johnson reviewed Woodall's scholastic records and did not indicate finding any intelligence score that placed Woodall below 70. In sum, Dr. Johnson stated,

> Questions have been raised about his mental functioning, particularly whether or not there is the presence of any mental retardation. The results of the evaluation at KCPC which included review of historical school and correctional records did not reveal any evidence of mental retardation IQ scores of less than 70 and

> deficits in adaptive behavior functioning). . . . His psychological testing placed him in the upper part of the borderline range (IQ scores of 70-79). . . . Mr. Woodall was seen as being capable of bearing criminal responsibility for his actions if found guilty on his current charges.

TE 13, defendant's Ex. 6. Trial counsel acted reasonably in relying on Dr. Johnson's assessment. Nothing in the record indicates that they should have questioned Dr. Johnson's determination that Woodall is not severely mentally retarded.

Woodall claims his trial counsel were ineffective because they allegedly bullied and coerced Woodall into accepting an open guilty plea. The Kentucky Supreme Court concluded on direct appeal that the plea was voluntarily. Therefore, they refused to consider whether counsel were ineffective in this regard. *See Woodall*, 2005 WL 3131603 at *2. This Court has already determined that the Kentucky Supreme Court's decision that the plea was voluntary was not in error. *See supra* Part J. Additionally, the Court observes that even if counsel did "bully" Woodall into accepting a guilty plea, the evidence against Woodall would have almost certainly resulted in a guilty verdict and a subsequent sentence of death. Indeed, it appears that counsel made a sound strategic choice in counseling Woodall to plead guilty. This choice likely was the best chance Woodall had to escape death. Thus, there is not a "a reasonable probability that, but for" Woodall's guilty plea "the proceeding would have

been different." *Strickland v. Washington*, 466 U.S. at 694.

Woodall also argues that his trial counsel were deficient for failing to present additional mental health expert testimony in support of their motion for a third continuance prior to the April 1998 trial date.

The Kentucky Supreme Court rejected this claim as follows:

> Appellant claims counsel was ineffective for failing to present additional mental health expert testimony in support of a third continuance prior to the April 1998 trial date. Counsel presented the testimony of one psychiatric expert, but Appellant claims it was not enough. When claiming ineffective assistance, Appellant may not base his claims merely on the fact that a defense tactic was unsuccesaful. *Strickland*, supra at 690. We find the testimony of one expert on the subject to be sufficient and reasonable assistance of counsel.

Woodall, 2005 WL 3131603 at *3.

Woodall's counsel did present an expert in support of their motion, Dr. Eric Drogin, a psychologist and attorney. TE 3 at 306. Dr. Drogin testified before the trial court at length. In the end, the trial court found Dr. Johnson's assessment of Woodall more reliable

than Dr. Drogin's assessment. As a result, the trial court did not find that additional testing was reasonably necessary under the circumstances. Woodall's counsel were unsuccessful. They did not, however, perform so deficiently that Woodall's constitutional rights were violated. *See Strickland*, 466 U.S. at 690.

Woodall also claims that his counsel were ineffective for failing to present an insanity defense. Dr. Johnson's report concluded that "there was not any evidence of a thought disorder or psychosis" present in Woodall. TE 13, defendant's Ex. 6. Although it appears that Woodall suffered from some mental problems, the expert opinion was that he was not legally insane. Woodall's actions in attempting to cover-up the crime after the fact also indicate that he was able to appreciate the wrongfulness of his actions and that he understood his behavior violated the law. Woodall also appeared able to cooperate with his counsel and Dr. Johnson. Woodall's counsel, however, did not exclusively rely on Dr. Johnson. They had Dr. Eric Drogin meet with Woodall on two occasions and review Dr. Johnson's report. Although Dr. Drogin had questions about the report, he was unable to conclude whether Woodall suffered from some type of psychosis. Given Dr. Johnson's report, Woodall's actions after the crime, and the overwhelming evidence of guilt, counsel made a wise and strategic decision to recommend that Woodall forgo an insanity defense and plead guilty. *See Lundgren v. Mitchell*, 440 F.3d at 773.

Additionally, Woodall claims that his counsel were ineffective for failing to link Woodall's mental condition to his genetic history. Evidence was presented at trial that Woodall's mother and brother experienced mental problems over the years. The Commonwealth did not attack Dr. Johnson's conclusions that Woodall had suffered from a personality disorder and borderline mental functioning. While counsel might have been able to produce additional evidence that other members of Woodall's maternal family have mental problems, their failure to do so cannot be said to have prejudiced Woodall. The jury certainly could have inferred that genetically the Woodall family has a history of mental problems from the testimony about Woodall's mother and brother. While additional testimony might have bolstered the connection, it is unlikely it would have changed Woodall's sentence. This is especially true since Woodall was not raised around these additional relatives. Woodall's mother was adopted as a young child and there is no evidence that Woodall had any contact with these other individuals as a child. *See Harbison v. Bell*, 408 F.3d 823, 830 (6th Cir. 2005) (holding that trial counsel's failure to introduce the fact that the petitioner's sister murdered her children and then committed suicide was not ineffective because there was no evidence presented during the habeas proceeding regarding how those events affected the petitioner).

Woodall also claims that his counsel were deficient in failing to have a PET scan performed. Woodall's counsel attempted to secure funding and a continuance to obtain the testing. Counsel explained to the trial

court that he had not obtained it earlier because he did not believe that it was going to be necessary in light of his then-planned defense of mental retardation. After Dr. Johnson's examination revealed that Woodall is not mentally retarded, counsel decided to request the PET testing in hopes of discovering a different defense. To support his request, Woodall's trial counsel consulted with a Dr. Drogin. Counsel offered Dr. Drogin's testimony to the trial court. After considering Dr. Drogin's testimony and Dr. Johnson's report, the trial court determined that additional testing was not reasonably necessary. Woodall's counsel did not perform deficiently. The simple fact is that the trial court decided against Woodall on this point. The fact that counsel lost this argument, however, does not mean that they were ineffective. *See Strickland*, 466 U.S. at 690.

Woodall claims that his counsel were defective in fully explaining the conditions of his upbringing including his fecal incontinence. The Kentucky Supreme Court rejected this claim as follows:

> Appellant acknowledges defense counsel offered the jury evidence of Appellant's fecal incontinence, squalid upbringing, and childhood sexual abuse. Appellant argues, however, that defense counsel was ineffective in convincing the jury that Appellant did not deserve the death penalty. The record reflects that defense counsel acted reasonably, and advocated Appellant's plight as appropriate under

> the circumstances. Furthermore, even if defense counsel had been a more zealous advocate of this evidence, it still would not create a reasonable probability the jury would have returned a lesser sentence. Accordingly, we find no ineffective assistance of counsel.

Woodall, 2005 WL 3131603 at *3

Capital defense counsel has an affirmative duty to pursue mitigation evidence and to conduct an appropriate investigation into potential mitigating factors:

> Counsel's constitutional duty to investigate a defendant's background in preparation for the sentencing phase of a capital trial is "well-established." *Coleman v. Mitchell*, 268 F.3d 417, 449 (6th Cir. 2001); *see also Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997). The "prospect of being put to death unless counsel obtains and presents something in mitigation" magnifies counsel's responsibility to investigate. *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999). And notwithstanding the deference *Strickland* requires, neither this court nor the Supreme Court has hesitated to deem deficient counsel's failure to fulfill this obligation.
>
> . . .

> "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms.'" *Id.* at 523 (quoting *Strickland*, 466 U.S. at 688) . . . . More recent ABA Guidelines, which the United States Supreme Court has recognized as reflecting prevailing professional norms, emphasize that "investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases *Id.* 11.4.1 (C), p. 93 (1989) and adding emphasis).

Lundgren v. Mitchell, 440 F.3d at 770-71 (quoting *Harries v. Bell*, 417 F.3d 631, 637-38 (6th Cir. 2005)).

There was ample evidence presented to the jury that Woodall experienced a dysfunctional childhood plagued by poverty and instability. Several witnesses testified about the poor condition of his home, his mother's depression and weight problems, the absence of his father, his fecal incontinence, and the stress his brother's psychological problems placed on the family. He now argues that counsel should have presented more detailed and specific testimony about these areas. However, "a petitioner cannot establish ineffective

assistance by identifying additional evidence that could have been presented when that evidence is merely cumulative" to that already admitted. *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1324 n.7 (11th Cir. 2002). The additional evidence about Woodall's upbringing that he now argues should have been presented is cumulative to that elicited at trial.

Lastly, Woodall argues that trial counsel should have elicited additional testimony concerning the sexual abuse Woodall's mother inflicted upon him when she placed soap into his rectum. The Kentucky Supreme Court held that Woodall's counsel performed sufficiently in presenting testimony on this area. *Woodall*, 2005 WL 3131603 at *3.

Dr. Ricky Spears testified at trial that placing soap in Woodall's rectum was a form of sexual abuse and that those who are sexually abused are more likely to become sexual offenders. TE 11 at 1490-92. However, all of the trial lay witnesses that testified about this subject explained that Woodall's mother placed the soap in Woodall's rectum because she believed that it would help alleviate his constipation and might improve his problems with fecal incontinence. Thus, the overall agreement was that her intentions were not sexual in nature and her desire was to help, not harm, her son. Taking into account the circumstances surrounding these events, the Court finds that counsel made a strategic decision to limit the amount of testimony that they presented about the sexual abuse.

In conclusion, the Kentucky Supreme Court's resolution of Woodall's ineffective assistance of counsel claims was not contrary to or an unreasonable application of *Strickland*, nor did it result from an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

O. JUROR'S CONSULTATION OF THE BIBLE

Woodall's twenty-fifth and twenty-sixth claims for relief are that his constitutional rights were violated when Juror Hawkins consulted Bible verses about the death penalty during deliberations. She also avers that she printed some verses off of the internet and placed them in the jury room. She is uncertain whether any other jurors looked at them. Woodall has not presented evidence from any other jurors to support this claim. Woodall did not raise this claim on direct appeal or in his RCr 11.42 claim. It was raised for the first time by Woodall in a CR 60.02 motion.

The Kentucky Supreme Court held as follows:

> Thus, for the reasons set forth herein, Appellant's CR 60.02 claim is procedurally barred since the issue set forth within it should have been raised in his RCr 11.42 motion. *Gross , supra*, at 857 ("The language of RCr 11 .42 forecloses the defendant from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11 .42 proceedings .").

> **Even if Appellant's claims were not procedurally barred, relief would not be available, as his allegations are without merit. . . . In this case, aside from Juror H's uncorroborated affidavit, there is no evidence establishing what was actually brought into the jury room or that any other juror was affected by the presence of these materials. Juror H stands alone in her allegations, and we find such singular evidence to be insufficient to prove juror misconduct in this instance. Conversely, there was sufficient evidence for the jurors to reach an impartial, unanimous decision imposing the death penalty, especially in light of Appellant's voluntary guilty plea to the heinous murder of Sarah Hansen. The relevant public policy concerns of finality of a jury verdict, protecting jurors from continued post verdict interference, and maintaining the integrity of the jury trial system would be undermined if lone jurors were routinely permitted to second-guess the deliberative process once the trial is over. After the trial is over, the collective jury decisional process no longer exists. Accordingly, we find no abuse of the trial court's discretion, and agree that RCr 10.04 bars the proffered juror testimony in this case.**

Woodall, 2005 WL 2674989 at *1-2.

The Magistrate Judge concluded that this Court was barred from reviewing these claims because they were procedurally defaulted. In the alternative, the Magistrate Judge concluded that any error that occurred was harmless. The Court agrees with the Magistrate Judge's conclusions. The Kentucky Supreme Court explicitly found the that these claims were procedurally barred and unquestionably enforced the bar. Woodall has not shown good cause in this proceeding why he was prevented from raising the claims properly in state court nor has he proffered any evidence to suggest that in absence of the juror misconduct the verdict would have been different. Even Juror Hawkins did not aver that her verdict would have been different but for the Bible verses she considered. She only stated that the verses played a part in her decision. The Kentucky Supreme properly rejected these claims.

P. PROPORTIONALITY REVIEW

Woodall contends that the Kentucky Supreme Court's proportionality review was unconstitutional. Woodall first argues that the Kentucky Supreme Court only compared his sentence to other crimes where the death penalty was imposed, but should have compared it to similar crimes where the death penalty was not imposed. He also complains that the he did not receive access to the proportionality data compiled and relied on by the Kentucky Supreme Court.

Kentucky's proportionality statute provides that the court shall determine "whether the sentence of death

is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." KY. REV. STAT. *Id.*532.075(3)(c). To aid the court in its proportionality determination, KY. REV. STAT. *Id.*532.075(6) requires the Chief Justice of the Kentucky Supreme Court to assign to an administrative assistant who is an attorney the tasks of accumulating the records of all Kentucky felony offenses in which the death penalty was imposed after January 1, 1970, providing the court with summaries of those cases, and compiling any other data requested by the Chief Justice for the purpose of determining the validity of the death sentence. The Kentucky Supreme Court has held that a capital defendant does not have the right to the production of the court's proportionality research files for use in litigation. *Ex parte Farley*, 570 S.W.2d 617 (Ky. 1978); *Skaggs v. Commonwealth*, 694 S.W.2d at 682 (holding that "public advocate was not entitled to data compiled for this court pursuant to KRS *Id.*532.075(6)(a), (b) and (c)").

Comparative proportionality review on appeal is performed to ensure that a given death sentence is not disproportionate relative to other sentences imposed for similar crimes. Comparative proportionality, as opposed to inherent proportionality (which measures the proportionality of a sentence to the severity of the crime), is not required by the Constitution, *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984); *Bowling v. Parker*, 344 F.3d at 521; *Cooey v. Coyle*, 289 F.3d 882, 928 (6th Cir. 2002); *see also Coe v. Bell*, 161 F.3d 320, 352 (6th Cir. 1998) (finding no Eighth Amendment right to proportionality review), but if a state adopts a scheme

for such review, it must comport with due process. *Bowling v. Parker*, 344 F.3d at 521; *Greer v. Mitchell*, 264 F.3d at 691. The state court's failure to perform a statutory proportionality review is not reviewable in federal court as an issue of state law. *Pulley v. Harris*, 465 U.S. at 41; *Bowling v. Parker*, 344 F.3d at 521. Instead, federal habeas corpus review is limited to whether the state court engaged in a good faith proportionality review. *Walton v. Arizona*, 497 U.S. 639, 655-56 (1990), *overruled in part on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). Citing the lack of direction in the statute regarding how the Kentucky Supreme Court is to conduct its proportionality review, the Sixth Circuit has expressed grave doubts regarding whether the statute even creates a liberty interest giving rise to a federal due process claim for alleged procedural lapses by the state supreme court in its review. *Bowling v. Parker*, 344 F.3d at 521-22.

In *Bowling v. Parker*, the Sixth Circuit considered and rejected the identical argument advanced here by Woodall:

> Bowling argues that the Kentucky Supreme Court only compared Bowling's sentence to other crimes where the death penalty was imposed, but should have compared Bowling's sentence to similar crimes where the death penalty was not imposed. There is no clear support in Kentucky law for the proposition that the Kentucky Supreme Court must also consider those additional cases. In fact,

> Bowling notes this, stating that "Kentucky has limited review to cases in which the death penalty was imposed." Appellant Br. at 121.
>
> Bowling's recognition that Kentucky law does not require consideration of those additional cases reveals that he is actually arguing that Kentucky has an ineffective framework for assessing proportionality rather than a claim that Kentucky misapplied its own framework. This forecloses Bowling's due-process argument, however, for there is no violation of due process as long as Kentucky follows its procedures. We note that we also have specifically rejected this type of challenge to Ohio's proportionality statutes.

Id. (citing *Buell v. Mitchell*, 274 F.3d 337, 368-69 (6th Cir. Ohio 2001)).

Woodall also complains about the Kentucky Supreme Court's refusal to share its underlying data. In determining that Woodall's sentence was not excessive or disproportionate, the Kentucky Supreme Court "considered all the cases in which the death penalty was imposed since 1970 involving both the crime and the defendant." *Woodall*, 63 S.W.3d at 133. Those cases should all be reported. Woodall was free to examine the cases himself and make any arguments he deemed appropriate from that examination. There is no

constitutional requirement that a court must share its legal research with an appellant.

Woodall has failed to show that the Kentucky Supreme Court did not engage in a good faith proportionality review. Accordingly, this claim is denied.

Q. NON-STATUTORY AGGRAVATORS

Woodall's twenty-eighth claim is that trial court considered non-statutory aggravators in accepting the jury recommendation that Woodall be sentenced to death. Specifically, Woodall alleges that the trial judge considered Woodall's lack of remorse and the heinous nature of the crime. In rejecting this claim the Kentucky Supreme Court explained:

> The trial judge properly relied on nonstatutory aggravating factors to enhance the sentence. Woodall claims that such use is unconstitutional. Similar arguments have been rejected by this Court in *Matthews v. Commonwealth*, Ky., 709 S.W.2d 414 (1986); *Mills v. Commonwealth*, Ky., 996 S.W.2d 473 (1999) and *Tamme v. Commonwealth*, Ky., 973 S.W.2d 13 (1998). The use of nonstatutory aggravating circumstances is permissible as long as the jury makes the required finding that at least one statutory aggravating circumstance exists. We find no error in this respect.

Woodall, 63 S.W.3d at 132.

The Court adopts the Magistrate Judge's Report and Recommendation with respect to this claim. Additionally, the Court observes that as noted by the Kentucky Supreme Court, Kentucky law does not bar the trial judge from considering non-statutory aggravators in deciding whether to accept or reject the jury's recommendation of death. Furthermore, the United States Supreme Court has refused to bar even a jury's consideration of non-statutory aggravators so long as a statutory aggravator exists to support the decision. *See Barclay v. Florida*, 463 U.S. 939, 966-67 (1983) (Stevens, J., concurring) ("[A]lthough a death sentence may not rest solely on a nonstatutory aggravating factor, the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either the statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime.").

R. EXECUTION OF THE INCOMPETENT

Woodall claims that he is not competent to be executed. The Magistrate Judge determined that this claim is not yet ripe. Woodall does not object to the Magistrate Judge's finding. Accordingly, it stands.

S. CUMULATIVE ERROR

Woodall's thirtieth and final claim is that the cumulative effect of the errors at trial rendered his trial fundamentally unfair in violation of due process. The Kentucky Supreme Court resolved this claim as follows: "There is no basis to claim cumulative error in this case. We have found no error that has existed in any of the other assignments of error by Woodall, and consequently we find no cumulative error. *Woodall*, 63 S.W.3d at 134 (citing *Sanders v. Commonwealth*, 801 S.W.2d 665 (1991)). The Supreme Court has repeatedly stated that fundamentally unfair trials violate due process. *See, e.g., Riggins v. Nevada*, 504 U.S. 127 (1992). However, "the law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue." *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. Ohio 2006); *see also, Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) (discussing cumulated evidentiary errors). Accordingly, this claim does not merit issuance of the writ.

V. CERTIFICATE OF APPEALABILITY

In the event that Woodall wishes to appeal any aspect of this Court's decision, he is required to obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(a); FED. R. APP. P. 22(b). A district court must issue or deny a COA and can do so even though the petitioner has yet to make a request for such a certificate. *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002) ("Whether the district court judge

determines to issue a COA along with the denial of a writ of habeas corpus or upon the filing of a notice of appeal, the district judge is always required to comply with *Id.*2253(c)(2)&(3) by 'indicat[ing] which specific issue or issues satisfy the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2).").

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.*2253(c)(2); *Slack v. McDaniel*, 529 U.S. at 483. The Supreme Court has recognized that the current version of *Id.*2253 codified the standard set forth in *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983) and stated:

> To obtain a COA under *Id.*2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.' " *Barefoot, supra*, at 893, and n. 4 . . . ("sum[ming] up" the " 'substantial showing' " standard).

Slack v. McDaniel, 529 U.S. at 483-84. The Supreme Court further noted that the standard used to govern the COA analysis depended upon whether the lower

court dismissed the petition after a substantive review of the merits, or merely dismissed the petition on procedural grounds. In the case of the former, the Court held "the showing required to satisfy *Id.*2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. When a district court denies such a motion on procedural grounds without addressing the merits of the motion, a certificate of appealability should issue if the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* When a plain procedural bar is present and the district court is correct to invoke it to dispose of the matter, a reasonable jurist could not conclude either that the court erred in dismissing the petition or that the petitioner should be allowed to proceed further. *Id.* at 484-85. In such a case, no appeal is warranted. *Id.* at 485.

Where this Court ruled upon the merits of Woodall's arguments, it has reexamined the merits of the issues in light of *Slack's* more "straightforward" analysis to determine whether reasonable jurists could find its analyses with respect to these grounds debatable or wrong. With the exception of Woodall's claim number five that the jury instructions impermissibly implied required unanimity with respect to mitigating circumstance, it finds that none of the issues merits a COA. The claims presented in the petition were

clear-cut, easily addressed, and provided no bases for granting federal habeas relief. The Court is persuaded that reasonable jurists would not debate the correctness of its assessment of these claims. The basis of the Court's decision to grant a COA with respect to claim number five is explained in the body of this Opinion.

VI. ORDER

The court **ADOPTS** the Magistrate Judge's Report and Recommendation with the modifications discussed above.

IT IS ORDERED that Petitioner Robert Keith Woodall's application for a writ of habeas corpus (DN 1) is **GRANTED IN PART** and **DENIED WITH PREJUDICE IN PART**. The application is **GRANTED** as to 1) Petitioner's claim that the trial court's failure to give a no adverse inference instruction as requested by Petitioner violated his Fifth Amendment right to remain silent and his Fourteenth Amendment right to a fair trial and 2) the trial Court's failure to recognize that Petitioner had a right to make a Batson challenge to the exclusion of an African-American juror violated the due process and equal protection clauses of the Fourteenth Amendment. The application is in all other respects **DENIED.**

IT IS FURTHER ORDERED that Petitioner Robert Keith Woodall's sentences of September 4, 1998, to death and life in prison for the rape, murder, and kidnapping of Sarah Hansen are **VACATED**, and this

matter is **REMANDED** to the state trial court for further proceedings.

IT IS FURTHER ORDERED that a certificate of appealability shall issue with respect Petitioner's claim that the jury instructions impermissibly implied required unanimity with respect to mitigating circumstances.

Date: February 23, 2009

s/Thomas B. Russell
Thomas B. Russell
Chief Judge, U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

ROBERT KEITH WOODALL
Petitioner

v. No. 5:06CV-00216-R

THOMAS SIMPSON, Warden
Respondent

MAGISTRATE JUDGE'S REPORT and RECOMMENDATION

The petitioner has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket Entry No. 6). The respondent has responded in opposition to the petition, and the petitioner has replied thereto (Docket Entry Nos. 16 and 21). This matter has been referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636.

Discussion

The petitioner entered pleas of guilty in the Caldwell Circuit Court (the Honorable Bill Cunningham) to charges of capital murder, capital kidnapping, and first-degree rape. Following a jury sentencing trial, at which he asserted his Fifth Amendment right not to testify in his own behalf, he was sentenced to death for murder and concurrent life terms for kidnapping and

rape. The petitioner's convictions were affirmed upon direct appeal by the Supreme Court of Kentucky. *Woodall v. Commonwealth*, Ky., 63 S.W.3d 104 (2001). Thereafter, the petitioner filed motions for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. The trial court denied the motions, and the denials were affirmed upon appeal to the Kentucky Supreme Court. 2005 WL 3131603 and 2005 WL 2674989. The petitioner raises the same thirty claims that were presented to the state courts and, therefore, has exhausted available state remedies or procedurally defaulted as to those claims.

Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d). The petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct. See 28 U.S.C. § 2254(e)(1) and *McAdoo v. Elo*, 365 F.3d 487, 493-494 (6th Cir., 2004).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a

conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from the Supreme Court's decisions but unreasonably applies it to the facts of the petitioner's case. *Id.* In analyzing whether a state court decision is "contrary to" or an "unreasonable application" of clearly established Supreme Court precedent, a federal court may only look to the holdings of the Supreme Court's decisions as of the time of the relevant state-court decision. *Id.* The court may look to lower courts of appeals' decisions, not as binding precedent, but rather to conduct the analysis of Supreme Court holdings to determine whether a legal principle had been clearly established by the Supreme Court. *Hill v. Hofbauer*, 337 F.3d 706, 716 (6th Cir., 2003).

First Claim

The petitioner's first claim is that he was denied due process, his Fifth Amendment right not to testify, and a reliable sentence determination when the trial judge refused to instruct the jury to draw no adverse inference from his decision not to testify during the penalty trial. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> Woodall pled guilty to all of the charged crimes as well as the aggravating

circumstances. The no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. That is not the situation presented here. The instruction contemplated by *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), could not have changed the outcome of a guilty determination that the defendant acknowledged by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.

There is no error in this respect. Any possible error would be nonprejudicial because the defendant admitted the crimes and the evidence of guilt is overwhelming. Woodall claims that *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), extended Fifth Amendment protection and thus the *Carter*, *supra*, rule to the penalty phase of a trial. *Estelle*, *supra*, is not a jury instruction case, unlike *Carter*. *Estelle* does not cite to *Carter* or indicate that *Carter* has been extended. The factual situation in *Estelle* is different from that presented in this case because it involved the use of an out-of-court statement the defendant made to a government expert. The statement in that case was in regard

to a psychological examination by the government prosecutors which was used against the defendant without warning in the penalty trial. Neither *Carter* nor *Estelle* involved a guilty plea. Here, Woodall admitted guilt to all charges and did not contest the facts. He was not compelled to testify so there were no words that could be used against him so as to implicate the Fifth Amendment privilege as in *Estelle*.

Woodall contends that *Mitchell v. United States*, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), permits a guilty plea which does not waive the privilege against self-incrimination at the sentencing phase. *Mitchell, supra,* does not apply here. In *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine within 1000 feet of a school or playground. She reserved the right to contest the amount of the cocaine at the penalty phase. The amount of the cocaine would determine the range of penalties. She only admitted that she had done "some of" the conduct charged. She did not testify. Three other codefendants did testify as to the amount of cocaine she had sold. Ultimately, the U.S. Supreme Court ruled that it would not permit a

> negative inference to be drawn about her guilt with regard to the factual determination respecting the circumstances and details of the crime. Here, Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes.
>
> The decision of the trial court not to give an adverse inference instruction does not amount to constitutional error so as to require reversal. There is no violation of any section of the United States or Kentucky Constitution.

63 S.W.3d 104 (2001). The magistrate judge concludes that the state court's adjudication of the petitioner's first claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. According to the petitioner, the nature of the constitutional harm in this case was that, absent the instruction, the jury was free to draw the same improper inference of lack of remorse due to silence that the trial judge himself made. According to the petitioner (Docket Entry No. 21, pp. 29 and 32) (*emphasis added*):

> Petitioner, who did not testify at the penalty phase, requested an instruction

informing the jury that he had no obligation to testify and that no adverse inference can be drawn from his failure to do so. Petitioner was rebuffed by the trial court who determined that it would not be "intellectually honest" to give the jury instruction because Petitioner's constitutional right against self-incrimination had been waived when he pled guilty to the charges. (TE 1589). The trial court stated that he would not tell the jury that "you can go out and rape, murder and kidnap and admit it and then offer no testimony, no explanation, **no asking for forgiveness, no remorse**, and the jury can't consider that." (TE 1591). The trial court refused this instruction even though the state interposed no objection to the instruction.

. . .

The strong likelihood that the jury drew an adverse inference from Petitioner's silence is reinforced by the actions of the trial court, a supposedly learned jurist, who held Petitioner's silence against him as an expression of a lack of remorse in deciding that the death sentence was appropriate and that death would be imposed. . . . Absent a jury instruction prohibiting such an adverse inference from petitioner's silence, it is likely that the jury too improperly concluded that

Petitioner suffered no remorse for his crimes.

In footnote 25, the petitioner cites to numerous cases in which the United States "Supreme Court has noted the mitigating role of remorse *(emphasis added)* in trials" (p. 32).

2. *Mitchell v. United States*, 526 U.S. 314 (1999), is the most recent United States Supreme Court decision on the issue of a criminal defendant's Fifth Amendment right to remain silent during the penalty phase of trial.

3. Mitchell pled guilty to conspiracy to distribute cocaine, reserving her right to contest, at the sentencing proceeding, the drug quantity attributable to her under the conspiracy count. It was the district judge's duty to determine quantity. During sentencing, the judge expressed his decision making process with candor. He stated that he was persuaded by the testimony of Mitchell's testifying co-defendant on the issue of drug quantity and that "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times. . . . I'm taking the position that you should come forward and explain your side of this issue." The Court held that the district judge erred in drawing an "adverse inference with regard to the amount of drugs attributable to [Mitchell]" or any other "factual determinations respecting the circumstances and details of the crime."

4. However, the Supreme Court specifically stated that "[w]hether silence bears upon the determination of a **lack of remorse, or upon acceptance of responsibility** . . . is a separate question. It is not before us, and we express no view on it."

5. The petitioner's claim is premised upon an allegedly improper inference of lack of remorse due to silence. A careful reading of *Mitchell* shows that such an inference is *not* prohibited by United States Supreme Court precedents. Therefore, the Kentucky Supreme Court's disposition of the petitioner's first claim was not "contrary to" nor did it involve an "unreasonable application of" United States Supreme Court precedents as contemplated by 28 U.S.C. § 2254(d).

6. In his dissenting opinion, Justice Scalia opined that, while the Fifth Amendment protects a criminal defendant from compelled testimony during sentencing, it should not also "shield her from the natural and appropriate consequences of her uncooperativeness at the sentencing stage," including logical inference with respect to the factual circumstances and details of the crime. Justice Scalia predicted that the majority approach would result in a split of authority in the lower courts and threatened the following perverse results:

> Of course the clutter swept under the rug by limiting the opinion to "determining facts of the offense" is . . . application of today's opinion . . . to all determinations

> of acceptance of responsibility, repentance, character, and future dangerousness, in both federal and state prosecutions – that is to say, to what is probably the bulk of what most sentencing is all about. If the Court ultimately decides – in the fullness of time and after a decent period of confusion in the lower courts – that the "no inference" rule is indeed limited to "determining facts of the offense," then we will have a system in which a state court can increase the sentence of a convicted drug possessor who refuses to say how many ounces he possessed – not because that suggests he possessed the larger amount (to make such an inference would be unconstitutional!) but because his refusal to cooperate suggests he is unrepentant.

7. Just as Justice Scalia predicted, in the wake of *Mitchell*, the lower courts have confronted the issue of whether it is unconstitutional for the sentencing entity to hold the defendant's silence against her as showing a lack of remorse. Lower courts have confronted the issue in the context of petitions pursuant to 28 U.S.C. § 2254, and have concluded that the decision by the state court of no constitutional violation based upon an inference of lack of remorse does not involve an unreasonable application of United States Supreme Court authorities. *See,* for example, *Isaacs v. Head*, 300 F.3d 1232 (11th Cir., 2002), *Hemby v. Hannigan*,117

F.Supp.2d 1057 (D.Kan.,2000), *Burr v. Bertrand*, 2007 WL 3228830 (E.D.Wis.) and *Emmett v. True*, 2006 WL 482417 (W.D.Va.).

8. Because it was not necessarily improper for the jury to consider the petitioner's silence as showing a lack of remorse, the trial judge did not err in denying an instruction requiring the jury not to consider the petitioner's silence.

Second Claim

The petitioner's second claim is that he was denied due process and equal protection of the law because the trial judge failed to conduct an inquiry into and make findings of fact concerning the alleged discriminatory intent and credibility of the reasons given by the prosecutor for a peremptory challenge of the only African American in the final jury pool. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> At the conclusion of the voir dire examination, only one African American remained in the jury pool. The other African American called for jury duty had been challenged and removed for cause. No motion was made to strike the remaining juror for cause but the prosecution exercised a peremptory strike against her. In a response to an objection by the defense, the prosecutor stated that the juror had been struck because she

answered a question on a jury questionnaire to the effect that she "did not trust anyone." Woodall contends that the prosecution struck the juror solely because of her race in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In *Batson*, *supra*, the United States Supreme Court promulgated a three step process for determining whether peremptory challenges had been properly exercised. First, a defendant must establish a *prima facie* case of racial discrimination. Second, the prosecutor must provide a race neutral reason for the exercise of the peremptory challenge, and third, the trial court is to conduct an inquiry into the ultimate question of whether there was discriminatory intent in the exercise of the peremptory challenge. Our examination of the record in this case indicates that the justification for striking peremptorily the one remaining African American juror was not a pretext for racial discrimination. The Commonwealth can rely on a jury questionnaire to derive its race neutral reasons for striking a juror. *Commonwealth v. Snodgrass*, Ky., 831 S.W.2d 176 (1992). An attitude of mistrust expressed on a juror questionnaire should be given the same

> weight as an attitude of mistrust or bias expressed by a juror on voir dire examination. *Batson* was not intended to remove all prosecutorial discretion as to the use of peremptory challenges but only to eliminate the obviously bad practice of eliminating potential jurors because of their race only. The evaluation of whether the offered reasons for a prosecutorial challenge remains in the sound discretion of the trial judge. *See U.S. v. McMillon*, 14 F.3d 948 (4th Cir., 1994), which stated in part that the trial court, present on the scene, found the reasons articulated were both nondiscriminatory and actual. Under all the circumstances, the trial judge did not abuse his discretion by rejecting the *Batson* challenge.

63 S.W.3d 104 (2001). The magistrate judge concludes that the state court's adjudication of the petitioner's second claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. According to the petitioner, the trial judge failed to perceive that there was a potential *Batson* error and that the mere fact that the petitioner was white and the removed juror was black did not *ipso facto* preclude application of *Batson*. The petitioner relies upon the

fact that "[o]ther than observing Petitioner's race is white, the trial court simply 'noted' the defense objections and moved on. (TE 1166)" (Docket Entry No. 21, p. 36).

2. The petitioner is correct that the requirement of race-neutral peremptory challenges applies even when the defendant is of a different race than the challenged jurors. *Powers v. Ohio*, 499 U.S. 400 (1991). However, just because the trial judge noted the petitioner's race does not mean than he was unaware of *Powers*. A more likely reason why the trial judge "moved on" without an elaborate on-the-record articulation of the third step of the *Batson-Powers* inquiry (*see* discussion of *Batson* by Kentucky Supreme Court, *supra*) is that he was satisfied that the prosecution's reliance upon the black juror's responses to a juror questionnaire constituted a non-pretextual, race-neutral explanation for its desire to utilize a peremptory strike.

3. To the extent the petitioner's position is that the trial judge failed to adequately develop the record with respect to completion of the third step of the *Batson* inquiry, it has been held that "the burden rest[s] upon the petitioner to rebut and develop a record demonstrating the prosecution's proffered nondiscriminatory rationale for the peremptory strike was pretextual." *Bell-Bey v. Roper*, 499 F.3d 752 (8th Cir., 2007) citing *Rice v. Collins*, 546 U.S. 333, 338 (2006). Similarly, "a trial court can fulfill its duty to rule at the so-called 'step three' of the *Batson* framework by expressing a clear intention to uphold or reject a strike after listening to the challenge, the

race-neutral explanation and the arguments of the parties." *Messiah v. Duncan*, 435 F.3d 186, 189 (2nd Cir., 2006).

4. Alternatively, the undersigned concludes that the trial judge implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry. *See Hightower v. Terry*, 459 F.3d 1067 n.9 (11th Cir., 2006) ("The trial court's overruling of Hightower's *Batson* objection would have defied logic had the court disbelieved the prosecutor's race-neutral explanations. We may therefore make the common sense judgment – in light of defense counsel's failure to rebut the prosecutor's explanations and the trial court's ultimate ruling – that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry.").

Third Claim

The petitioner's third claim is that the trial judge abused his discretion by striking two potential jurors for cause. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> Initially, we must observe that jurors who are substantially impaired in their ability to impose a death sentence may be excused for cause. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). After an exhaustive

examination of the record in regard to the first potential juror, we conclude that the trial judge did not abuse his discretion in excusing her for cause. The potential juror was relatively articulate and knowledgeable about the different range of penalties available in the case. She expressed a considerable interest in a penalty of life in prison for 25 years without hope of parole. Near the end of the voir dire by the prosecution, she clearly stated that she did not like capital punishment and that she would not consider it period. Although the potential juror was 78 years old, she seemed to be in full command of her faculties and knowledgeable about the legal system.

The second juror indicated a hesitancy and an ambivalence about the death penalty. When asked if he could consider the range of possible punishments, including death, he answered "No sir, I don't think I could do that." Later, when asked if he could consider death if the judge instructed the jurors to give each one fair consideration, the juror answered, "I don't think I consider the death penalty as far as something like that, no sir." The second juror was struck for cause and the defense made no objection. Both jurors were properly struck for cause.

63 S.W.3d 104 (2001). The magistrate judge concludes that the petitioner has presented no "clear and convincing evidence" as contemplated by 28 U.S.C. § 2254(e)(1) that the trial judge's factual determination that the wavering prospective jurors should be excluded was erroneous. Alternatively, the state court's adjudication of the petitioner's third claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. The petitioner's claim with respect to the second juror who was struck for cause is procedurally defaulted under state law and may not be considered by this federal habeas court because the defense made no contemporaneous objection.

2. Even if the claim is not defaulted, upon habeas review, determinations as to individual juror bias, in both trial and capital sentencing juries, are factual questions entitled to the presumption of correctness codified at 28 U.S.C. § 2254(e)(1). *See Wainwright v. Witt*, 469 U.S. 412 (1985), *Darden v. Wainwright*, 477 U.S. 168, 175 (1986), and *Patton v. Yount*, 467 U.S. 1025 (1984) (finding that impartiality of individual jurors is a question of fact). A petitioner must rebut a finding of fact by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

3. The underlying rationale for the presumption of correctness of a trial judge's decision to exclude a prospective juror from a death penalty proceeding was well articulated in *Ruiz v. Quarterman*, 460 F.3d 638 (5th Cir., 2006), as follows:

> Lay persons come to the courthouse with varying levels of education and thought about capital punishment. The opening of a capital trial is an alien environment to citizens called from jobs and homes. Lay persons are confronted by skilled lawyers engaged in an adversarial contest who probe their views on a profound and divisive social issue, usually with a goal of retention or exclusion shaping the questions. We know from experience that the result is often a series of responses that seem to shift and turn and even conflict as questions are framed, reframed and just repeated. A stranger to the trial reading the bare transcript is left with incomplete sentences and elliptic answers with no reconciling theme. Yet one present at trial may well have had a quite different picture. Inflection of voice and body movements of each cast member, absent from the transcript, are present at trial. Until at least twenty-one years ago, such transcripts confounded appellate courts. *Wainwright v. Witt* responded to the not infrequent frustration of appellate review of the calls of trial judges made in

> the process of selecting jurors for the trial of capital cases with a pragmatic solution. The court acknowledged that a prospective juror's bias "involves credibility findings whose basis cannot be easily discerned from an appellate record." The Court observed: "[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen [by the trial court] below, but cannot always be spread upon the record." "Despite this lack of clarity in the printed record, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Ms. Castro is the classic wavering prospective juror. This was a call to be made by the trial judge, and there is no record basis for concluding that the court abused its discretion.

4. Viewed in a light most favorable to the petitioner, the excluded jurors were wavering prospective jurors. The petitioner has presented no "clear and convincing evidence" as contemplated by 28 U.S.C. § 2254(e)(1) that the trial judge's factual determinations were erroneous. In *Brown v. Lambert*, 2004 WL 5331923 (W.D.Wash.) and *Cummings v. Polk*, 2006 WL 4007531 (E.D.N.C.), the district courts reached this same conclusion.

5. Alternatively, to the extent the court should review the state court's decision of no abuse of discretion by the trial judge through the lens of 28 U.S.C. § 2254(d), even if this court were to disagree with the trial judge's determination, we cannot conclude that it was contrary to or involved an unreasonable application of clearly established United States Supreme Court precedents. *See Knight v. Dretke*, 2004 WL 2026809 (N.D.Tex.). At best, the petitioner has shown that substantial evidence would have supported a decision by the trial judge to retain the stricken jurors. That does not satisfy our standard of review as codified at 28 U.S.C. § 2254(d).

Fourth Claim

The petitioner's fourth claim is that the trial judge abused his discretion by failing to strike six allegedly unqualified jurors for cause and thereby violated his right to an impartial jury and impaired his use of peremptory challenges. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> Woodall used all ten of his peremptory challenges; three of the peremptory challenges were exercised on jurors he had sought to remove for cause. He also unsuccessfully challenged for cause three of the twelve jurors who sat on the case. Motions to strike jurors for cause are within the sound discretion of the trial

judge. [*Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1993).]

In regard to Juror 278, the allegation that she was impaired because her sister had been raped is without merit. The refusal to strike jurors for cause because they had previously been victims of violent crimes has been repeatedly upheld. *See* [*Hodge v. Commonwealth*, Ky., 17 S.W.3d 824 (2000)]; *Stoker v. Commonwealth*, Ky., 828 S.W.2d 619 (1992). Here, the crime victim was the juror's sister rather than herself. There was no cause for strike.

It was never established that the employment of the juror at the Kentucky State Penitentiary gave her any special knowledge about parole, and there is no authority for the proposition that mere knowledge about parole eligibility is a basis for a challenge for cause. The trial judge recognized the fact that the potential juror was taking antidepressant medication and properly believed that she could serve if necessary. *Bowling, supra.* There was no abuse of discretion in regard to the potential juror. The contention that the juror was biased because her daughter's band competed against the victim's band was unsupported by the record.

Juror No. 176 possessed no special knowledge that could have influenced other jurors. The argument that the juror was situationally impaired because she had worked at the mini-market for one month more than six months after the crime occurred is without merit. The juror specifically denied on voir dire that she knew one of the prosecution witnesses and there was no evidence to substantiate the claim by Woodall. The juror indicated on voir dire that any conversations she may have had with fellow workers at the mini-mart were of a general nature. There was no abuse of discretion in refusing to strike the juror for cause.

Juror No. 94. Woodall argues that the juror should have been struck [sic.] for cause because she could not consider a minimum sentence. The record shows that the juror indicated on two different occasions that she could consider the entire range of penalties. In response to the trial judge's question of whether she could consider a twenty-year sentence if so instructed, she answered she could if it were supported by the evidence. Although a juror is disqualified if he or she cannot consider the minimum penalty pursuant to [*Grooms v. Commonwealth*, Ky., 756 S.W.2d 131 (1988)], excusal for cause is not required merely because the juror

favors severe penalties, so long as he or she will consider the full range of penalties. *Hodge*, citing *Bowling*. Per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination. *Hodge*.

Woodall claims that Juror No. 185 should have been excused for cause pursuant to KRS 29A.080(2)(d) because he had an insufficient knowledge of the English language and was unable to understand what was being said in voir dire. Woodall also argues that the juror never indicated whether he could consider I.Q. of 74 of Woodall as a mitigating factor. No. 185 sat as a juror. He stated on two separate occasions that he could consider mitigating evidence and follow the instructions of the trial judge on mitigating evidence. During voir dire, the juror stated he could consider someone's stability as a mitigating circumstance. There was no abuse of discretion in denying the motion to strike for cause.

Juror No. 16 was removed from the case by peremptory challenge after a motion to strike for cause had been denied. Woodall claims that the juror was impaired because he could not consider mitigating evidence. Although the juror may have

been temporarily confused on voir dire, he finally indicated that he would consider mitigating evidence, "If the court instructs me that way." The juror satisfied the requirements of *Grooms, supra*, and the trial judge did not abuse his discretion in refusing to strike the juror for cause.

Potential Juror No. 8 was peremptorily challenged after the trial judge had refused to strike him for cause. Woodall complains that the motion for cause was denied because the juror had properly answered what he labels as the "leading questions" by the judge about considering the entire range of punishment. When initially asked if he could consider a 20-year minimum sentence, the juror answered "I don't know," and later proclaimed that he was for the death penalty. After appropriate rehabilitation by the trial judge, the juror indicated that he would base any decision in the case as to punishment on the evidence presented. The trial judge did not use leading questions in order to elicit such an answer. The proscription provided in *Montgomery v. Commonwealth*, Ky., 819 S.W.2d 713 (1991), is not applicable.

The refusal of the trial judge to strike jurors for cause did not violate the right

> to a fair and impartial jury and did not unnecessarily compromise his use of the allotted peremptory challenges.

63 S.W.3d 104 (2001). The magistrate judge concludes that the petitioner has presented no "clear and convincing evidence" as contemplated by 28 U.S.C. § 2254(e)(1) that the trial judge's factual determination that the jurors should be excluded was erroneous. Alternatively, the state court's adjudication of the petitioner's third claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. The petitioner claims that the trial judge should have stricken six jurors for cause. The petitioner eventually eliminated three of these jurors through utilization of peremptory challenges (Nos. 278, 16, and 8), and three sat as jurors during the sentencing trial (Nos. 176, 94, and 185).

2. *Ross v. Oklahoma*, 487 U.S. 81 (1988), held as follows:

> Peremptory challenges are not of constitutional dimension. They are a means to achieve an impartial jury. So long as the jury that sits is impartial, the fact that the defendant has to use a peremptory challenge to achieve that

> result does not mean the Sixth Amendment was violated.

Similarly, it has been held that "a defendant's exercise of peremptory challenges . . . is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause." *United States v. Martinez-Salazar*, 528 U.S. 304, 317 (2000). In such cases, "the system worked precisely as intended." *United States v. Quinn*, 230 F.3d 862 (6th Cir., 2000). The magistrate judge concludes that the petitioner waived any constitutional complaint with respect to juror nos. 278, 16, and 8 by removing them through peremptory strikes.

3. As to juror nos. 176, 94, and 185, a federal habeas court must presume any factual findings made by the state courts to be correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The question of whether a particular juror is qualified is "plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). This is so because of the nature of the voir dire process, designed specifically to identify biased jurors, and because a trial court's ruling on a motion to strike for cause is "essentially one of credibility, and therefore largely one of demeanor." *Id.* at 1038.

4. The petitioner has presented no "clear and convincing evidence" as contemplated by 28 U.S.C.

§ 2254(e)(1) that the trial judge's factual determination to retain the six jurors in question was erroneous. Alternatively, the state court's decision of no abuse of discretion by the trial judge was not contrary to nor did it involve an unreasonable application of clearly established United States Supreme Court precedents.

Fifth Claim

The petitioner's fifth claim is that the trial judge erred by instructing the jury, in effect, to find mitigating circumstances unanimously and beyond a reasonable doubt. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> Woodall . . . contends that the jury instructions, when read as a whole and given their common sense meaning, lead to a conclusion that the entire jury had to be unanimous. We find such argument unconvincing. This Court has repeatedly indicated that an instruction on unanimous findings on mitigation is not required. [*Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1993)]. This situation does not violate the doctrine set out in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), because there was no requirement the jurors unanimously reach a conclusion regarding any mitigating factor. Each individual juror was free to examine and

> react to any mitigating factor when determining the appropriate sentence. Any juror who found a mitigating factor could use that fact to prevent the unanimous sentence of death.

63 S.W.3d 104 (2001). The magistrate judge concludes that the petitioner has presented no "clear and convincing evidence" as contemplated by 28 U.S.C. § 2254(e)(1) that the state court erroneously determined that the jury instructions as a whole did *not* require the jury to find any mitigating factor to be present unanimously and/or beyond a reasonable doubt. Therefore, the petitioner's reliance upon *Mills v. Maryland*, 486 U.S. 367 (1988), lacks a necessary factual predicate. Alternatively, the state court's adjudication of the petitioner's claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Sixth Claim

The petitioner's sixth claim is that the verdict form used by the jury was erroneous. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> Similar arguments have been rejected in [*Hodge v. Commonwealth*, Ky., 17 S.W.3d 824 (2000); *Foley v. Commonwealth*, Ky., 942 S.W.2d 876 (1996); *Haight v. Commonwealth*, Ky., 938 S.W.2d 243 (1996)]; and *Wilson v. Commonwealth*,

> Ky., 836 S.W.2d 872 (1992). Federal courts have also refused to grant relief. *See James v. Whitley*, 926 F.2d 1433, (5th Cir., 1991); *Flamer v. Delaware*, 68 F.3d 736 (3rd Cir., 1995).

63 S.W.3d 104 (2001). The magistrate judge concludes that the state court's adjudication of the petitioner's claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Seventh Claim

The petitioner's seventh claim is that there were numerous improper and prejudicial comments by the prosecutor during closing arguments, all of which resulted in denying due process and a reliable determination of his sentence. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> Woodall claims that
>
> A) The prosecutor appealed to the jurors' sense of responsibility to the community.
>
> B) That the prosecutor expressed his personal opinion that death was the only true punishment and that for the sake of justice, the returning of such a penalty was the right thing to do.

C) The prosecutor improperly contrasted the pure goodness of the victim and sympathy for her family against the evil of the defendant.

D) The prosecutor improperly commented on the silence of the defendant at trial and denigrated the defense for allowing him not to testify.

E) The prosecutor misstated evidence and asked the jury to speculate about matters not in evidence.

F) The prosecutor misstated the law and nullified the instructions of the court concerning mitigating circumstances.

The prosecutor did not improperly appeal to the jury's sense of responsibility to the community. A prosecutor may call on a jury to do its duty. *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1988).

It should be noted that there were objections to portions of the closing statement by the prosecutor, but no objection was made to the errors alleged under this issue. It was not improper for the prosecutor to give his interpretation of the evidence and his recommendation as to the punishment. *See Hamilton v.*

Commonwealth, Ky., 401 S.W.2d 80 (1966). The prosecutor's argument was merely to give his recommendation based on the facts presented as well as the guilty plea, including the aggravating circumstances. The comments of the prosecutor were not inappropriate. The statements made by the prosecutor about both victim and defendant are not the basis for error. All of the comments made by the prosecutor were supported by the evidence. Of course, the defense had the opportunity for final closing arguments and response as thought to be necessary.

The Commonwealth may portray the reality of the violence, giving some background and information regarding the victim in order to give a full understanding of the nature of the crime. [*Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1993)]. In a concurring opinion, it has been stated that a prosecutor can provide the fact finder with a quick glimpse of the life the criminal chose to end so as to remind the jury that the victim was a unique human being. *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). We agree. We have found no error in bringing to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on

the face of the community. *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519 (1984). The references to the victim and her family did not in any way deprive Woodall of a fair and impartial trial. Victim impact evidence is another method of informing the sentencing authority about the specific harm caused by the crime. *Payne, supra.*

There was no improper reference to the lack of remorse or silence by the accused. We find nothing in the remarks of the prosecutor that refers to the lack of remorse or silence, but only in emphasis on the fact that Woodall pled guilty after he realized the amount of evidence the state had against him. The remarks used in this case are only a comment on defense strategy by the prosecutor. *Slaughter, supra.* The prosecutor was entitled to make a comment on the demeanor of Woodall in the courtroom. There was no objection to this comment and no prejudice resulted. It did not refer to a lack of remorse or silence or failure to testify. The prosecutor did not urge the jury to consider the plea as an aggravator.

The comments by the prosecutor were reasonable inferences drawn from the evidence. The prosecutor did not misstate evidence or ask the jury to speculate

about matters not in evidence. Clearly, the prosecutor can give his opinion of the evidence. *Cf. Tamme v. Commonwealth*, Ky., 973 S.W.2d 13 (1998). In addition, the evidence supports the inference that the clothing of the victim had been forcefully removed. The prosecutor did not improperly comment on the fact that a defense witness testified on direct examination that during the course of three years, Woodall sexually abused both of her daughters, and that he had gone to prison for sexually abusing another girl and not her two daughters. The prosecutor merely made a reasonable inference that it was unknown how many counts of sexual abuse were outstanding based on the evidence.

The mere phrase used by the prosecutor, "When does it end?" does not imply that Woodall would continue to be dangerous so as to invoke the condemnation expressed in *Ice v. Commonwealth*, Ky., 667 S.W.2d 671 (1984). This Court has recently approved the consideration by the jury of future dangerousness in [*Hodge v. Commonwealth*, Ky., 17 S.W.3d 824 (2000)] quoting *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct 2187, 129 L.Ed.2d 133 (1994).

> Finally, the prosecutor did not misstate the law or nullify the jury instructions regarding mitigating circumstances. The prosecutor is entitled to argue that mitigating evidence is entitled to very little weight. *See Tamme*. Defense counsel argued extensively to the jury about all the mitigating factors. Woodall has shown no actual prejudice. Many of the allegations presented under this assignment of error suggest that the decision at trial not to object was only trial strategy.

63 S.W.3d 104 (2001). The magistrate judge concludes that the state court's adjudication of the petitioner's claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. The Kentucky Supreme Court relied upon the fact that "no objection was made to the errors alleged under this issue." Under Kentucky law, if there was no contemporaneous objection to the prosecutor's closing argument, the issue is waived as a matter of state law unless the defendant can show that the acts complained of rise to the level of palpable error. *Justice v. Commonwealth*, Ky., 987 S.W.2d 306, 316 (1998). The Kentucky Supreme Court found no palpable error. Therefore, his claims are procedurally defaulted under

state law and may not be considered by this federal habeas court.

2. Even if the petitioner's claims were not waived, on habeas review, prosecutorial misconduct is subject to harmless error analysis. *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir., 1997). A petitioner must show that a trial error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The petitioner has failed to show a harmful error.

3. Even if the petitioner's claims were not waived and rose to the level of harmful error, they are without merit. Prosecutorial misconduct must be so egregious as to deny petitioner a fundamentally fair trial before habeas corpus relief becomes available. Thus, "[o]n habeas review, the relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the conviction a denial of due process." *Lundgren v. Mitchell*, 440 F.3d 754, 778 (6th Cir., 2006). The "touchstone of due process analysis . . . . is the fairness of the trial, not the culpability of the prosecutor." *Serra v. Mich. Dep't of Corr.*, 4 F.3d 1348, 1355 (6th Cir., 1993).

4. The test for determining whether habeas relief is available based upon improper prosecutorial remarks made in closing argument may be described as follows. First, the court should determine whether the remarks were improper by examining the context of the remarks and existing precedent. *United States v. Carroll*, 26 F.3d 1380, 1387-1389 (6th Cir., 1994). If the remarks

were improper, the court should determine whether they were "flagrant" by considering the following factors:

> Flagrancy is determined by an examination of four factors: 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused.

Id. If the remarks are flagrant, a new trial should be ordered. If not flagrant, the court should still determine whether the remarks were harmless error. *Id.* at p. 1390.

5. Even if the prosecutor's remarks were improper, they were not flagrant and/or harmful.

Eighth Claim

The petitioner's eighth claim is that the trial judge placed excessive and unfair restrictions on his ability to develop information about jurors on voir dire and as a result, his right to exercise peremptory challenges intelligently and his guarantee of a fair and impartial jury were violated. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

[The petitioner] claims that the trial judge repeatedly and severely curtailed his ability to question jurors during voir dire. There can be no question that an adequate voir dire examination is essential to the seating of a fair and impartial jury. This is particularly true in a death penalty case where an adequate voir dire process has been held to be mandatory. *Morris v. Commonwealth*, Ky., 766 S.W.2d 58 (1989).

A) It was not an abuse of discretion by the trial judge to restrict the voir dire of Woodall concerning specific mitigation evidence which he planned to present. The trial judge permitted Woodall to ask general mitigation questions, but prohibited questions about specific mitigating factors such as the low I.Q. attributed to Woodall. Federal courts have recognized that denying a defendant the right to voir dire jurors on specific mitigating factors is not an abuse of discretion. *See U.S. v. Tipton*, 90 F.3d 861 (4th Cir., 1996); *U.S. v. McVeigh*, 153 F.3d 1166 (10th Cir., 1998).

As in *Tipton, supra,* Woodall sought to question the jury about specific mitigating circumstances rather than a generalized inquiry as allowed by the trial judge. Here, the trial judge had

asked jurors on individual voir dire whether they were willing to consider the entire range of penalties and had also asked them if they were willing to consider mitigating evidence. The judge permitted Woodall to question jurors extensively regarding mitigating circumstances so long as the questions were general and did not inquire into specific mitigation. The trial judge has broad discretion in the area of questioning on voir dire. *Ward v. Commonwealth*, Ky., 695 S.W.2d 404 (1985). Questions are not competent when their evident purpose is to have jurors indicate in advance or to commit themselves to certain ideas and views upon final submission of the case to them. *Ward, supra*. The mere fact that more detailed questioning might have somehow helped the accused in exercising peremptory challenges does not suffice to show abuse of the discretion in conducting the examination. *See Tipton, supra; see also*, Annotation, "Propriety and Effect of Asking Prospective Jurors Hypothetical Questions, on Voir Dire, as to How They Would Decide Issues of the Case." 99 A.L.R.2d 7; *see also Commonwealth v. Moon*, 389 Pa. 304, 132 A.2d 224 (1957), cert. *dismissed*, 355 U.S. 908, 78 S.Ct. 335, 2 L.Ed.2d 270; *Commonwealth v.*

Everett, 262 Pa.Super. 61, 396 A.2d 645 (1978).

Woodall was trying to get jurors to indicate in advance what their views were regarding his I.Q. of 74. He was seeking to oblige jurors to commit themselves by either accepting a specific mitigator or rejecting it before any evidence was heard. The trial judge was attempting to protect against such danger and did not abuse his broad discretion. It should be recalled that in 1991, I.Q. testing measured Woodall's I.Q. at 74, and in 1998, a prosecution psychologist measured his full-scale I.Q. at 78. Both scores are 4 to 8 points respectively higher than the definition of a seriously mentally retarded offender as found in KRS 532.130(2). KRS 532.140 does not permit execution of a person below an I.Q. of 70.

B) Woodall complains that the trial judge abused his discretion by denying voir dire examination into the attitudes of the jurors regarding the right of Woodall to remain silent. We disagree. The trial judge correctly refused to allow proposed questions on the Fifth Amendment rights of the accused. There was no error on the part of the trial judge in this respect and in any event, it is nonprejudicial and

harmless beyond a reasonable doubt as noted earlier.

. . .

D) It was not error for the trial judge to deny Woodall an opportunity to voir dire on the subject of whether the jury must be unanimous in its findings of mitigation. Again, the trial judge has broad discretion to supervise the voir dire examination. If there was any confusion in the mind of the jury about mitigating circumstances at the voir dire stage, it was clearly resolved by the jury instructions which were proper. It was clear to the jurors that if one of them believed that Woodall did not deserve the death penalty, they could not return a verdict of death. The trial judge did not abuse his discretion by not permitting further inquiry by Woodall in this regard.

E) The refusal of the trial judge to permit defense counsel to voir dire potential jurors on their opinions about the differences in the burden of proof for mitigating circumstances and aggravating circumstances does not amount to reversible error. Mitigating circumstances do not have to be proven beyond a reasonable doubt. *See Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). On the other

hand, KRS 532.025(3) requires aggravating circumstances to be proved beyond a reasonable doubt. Such a difference is not a disparity which would give rise to either a challenge for cause or a peremptory.

. . .

G) Woodall argues that whether jurors can base their verdict on evidence is a separate inquiry from whether they can consider minimum sentences. He contends that the qualification placed on the questioning about the ability to consider minimum sentences was improper. The trial judge directed that the jurors only had to be able to consider a minimum sentence "if warranted by the evidence," and that such qualifications on the question were designed to conceal bias and not to disclose it.

Again, there is no question that Woodall is entitled to a jury that can fairly consider the entire range of punishments for his crimes. *Grooms v. Commonwealth*, Ky., 756 S.W.2d 131 (1988). It was proper for the trial judge to make it abundantly clear to the jurors that they must consider their verdict in light of the instructions given to them by the court and the evidence presented. The qualifying language required by the trial judge was

> proper and made it clear that if the instructions and the evidence so warranted, they could consider a minimum penalty. That is all that is required by the law. *See Hodge v. Commonwealth*, Ky., 17 S.W.3d 824 (2000); *Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1993).

63 S.W.3d 104 (2001). The magistrate judge concludes that the state court's adjudication of the petitioner's claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. A criminal defendant has the right to a fair and impartial jury. To secure this right, the Supreme Court has held that a defendant must have an adequate voir dire to identify unqualified jurors. *See Morgan v. Illinois*, 504 U.S. 719, 728 (1992). However, state trial courts are granted wide discretion in conducting jury voir dire. *See Mu'Min v. Virginia*, 500 U.S. 415, 424-427 (1991) and *Daniels v. Burke*, 83 F.3d 760, 766 (6th Cir., 1996). The state's obligation to impanel an impartial jury may be satisfied by less than a specific inquiry into a particular prejudice feared by the defendant. *See Ristaino v. Ross*, 424 U.S. 589, 595 (1976) and *Ham v. South Carolina*, 409 U.S. 524, 527-528 (1973).

2. The trial judge's preclusion of specific inquiry by defense counsel during voir dire did not rise to the level of denying the petitioner a fair and impartial jury.

Ninth Claim

The petitioner's ninth claim is that the use by the trial judge of statements made by him during a sex offender treatment evaluation, which the trial judge ordered after he pled guilty but before his penalty trial, to sentence him to death was unconstitutional. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> [Woodall] claims that the trial judge used the statements to sentence him to death and a term of years imprisonment which was a violation of his right against self-incrimination. We disagree.
>
> Woodall made no incriminating statements about the crimes for which he had already pled guilty. He denied remembering the circumstances surrounding the crimes. None of his rights were violated.
>
> Approximately one week after Woodall pled guilty, the trial judge ordered an evaluation be conducted pursuant to KRS 532.050(4) by the sex offender treatment program. Defense counsel objected to the

evaluation and the trial judge stated that he would not release the report to the defense nor the prosecution until after the penalty trial had been completed. The report stated that Woodall was extremely guarded in answering all questions and most responses were extraordinarily brief in nature. The evaluator observed that the interview was abbreviated and further limited by the defendant's professed inability to recall any specific events surrounding the offense.

The trial judge properly ordered the report pursuant to KRS 532.050(4) which provides in part that if a defendant has been convicted of rape, the court shall, prior to determining the sentence, order an evaluation to be conducted by the sex offender treatment program. Subsection 1 of the statute does not preclude the trial judge from ordering a presentence investigation report simply because this is a capital case. The statute does not require a presentence investigation report, but neither does it preclude such a report. The presentence investigation report is different from the sexual offender evaluation in subsection 4 of the statute.

The report was not used during the penalty phase and was not given to either

counsel until the time of sentencing when the trial judge approved the sentence as fixed by the jury. Pursuant to KRS 532.025 and 532.050, it is the duty of the trial judge to impose an appropriate sentence for the individual once guilt has been determined. Here, Woodall pled guilty and so there is no authority to prevent the trial judge from ordering the sex offender evaluation and the presentence report. Before pronouncing sentence, the trial judge gave the defendant the opportunity to make any amendments, alterations or changes to any of the reports. Woodall did submit some letters on his behalf but did not make a request for amendments, corrections or make objections. There is no evidence that the trial judge considered any statement made by Woodall during the evaluation in reaching the sentence ultimately imposed. The rights of the accused were not violated because he made no incriminating statements during the evaluation.

Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), is not applicable because it is factually different. In *Mitchell, supra,* the defendant did not deny committing crimes but only admitted some of the offenses

> she was charged with. Here the silence of Woodall did not cause the judge to assume that he had committed other crimes. He had already admitted committing the offenses when he pled guilty.
>
> Woodall never expressed any remorse during the trial and the trial judge considered the lack of expression of remorse when he followed the penalty fixed by the jury, however, there is no evidence the trial judge assumed lack of remorse from the evaluation report. We find relying on the principles in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), unpersuasive. In *Estelle, supra,* the Supreme Court held that the prosecution's use of psychiatric testimony at the sentencing phase of the defendant's capital murder trial to establish his future dangerousness violated his constitutional rights. Here, there is simply no evidence that the trial judge used the statements of Woodall during the evaluation to establish lack of remorse or the appropriateness of the penalties fixed by the jury.

63 S.W.3d 104 (2001). The magistrate judge concludes that the state court's adjudication of the petitioner's claim was not contrary to nor did it involve an unreasonable application of United States Supreme

Court precedents. In so finding, the undersigned has been guided by the following principles:

1. To the extent the petitioner's claim is that the trial judge lacked an adequate basis in state law to order a psychological evaluation report of the petitioner, the issue is not cognizable in a federal habeas corpus petition. *See* 28 U.S.C. § 2254(a) (a federal court may "entertain an application for a writ of habeas corpus . . . only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

2. To the extent the petitioner's claim is based upon *Estelle v. Smith*, 451 U.S. 454 (1981), it is unpersuasive because it lacks an essential factual basis, to-wit, that the trial judge used the statements of the petitioner during the evaluation to establish lack of remorse or the appropriateness of the penalties fixed by the jury.

3. The Kentucky Supreme Court found that the trial judge did not rely upon statements in the evaluation report but rather upon the petitioner's lack of remorse at the sentencing trial itself in support of his acceptance of the jury recommended death sentence. The undersigned regards this as a factual finding that is entitled to deference upon federal habeas review. *See* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence").

4. The petitioner has presented no clear and convincing evidence that the trial judge relied upon his statements in the evaluation report as opposed to his lack of remorse at trial.

5. Even if the petitioner could show that the trial judge, in fact, relied upon the report, the petitioner is unable to show that the trial judge would not have reached the same conclusion based upon his lack of remorse at trial. Hence, any error was harmless.

Tenth Claim

The petitioner's tenth claim is that his guilty plea was invalid because it was not a knowing, voluntary and intelligent waiver of his constitutional rights. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> [Woodall] states that the plea was not entered voluntarily because of his low intelligence and the impairment of counsel and that he did not understand that he would be waiving his Fifth Amendment privilege by pleading guilty and finally that the trial judge did not adequately establish the factual basis for the plea. He concedes that this issue is unpreserved.
>
> Woodall specifically answered the questions of the court regarding the

voluntariness of the plea in the affirmative on three different occasions. It is clear that Woodall understood all the consequences of his plea. Counsel made it clear that he had discussed the case with the defendant and he stated that he believed the plea to be voluntary. As stated in *Kotas v. Commonwealth*, Ky ., 565 S.W.2d 445 (1978), citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the validity of a guilty plea is determined not by reference to some magic words but from the totality of the circumstances surrounding it. Here, there was the necessary affirmative showing in the record that the plea was intelligently and voluntarily made as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and noted in *Sparks v. Commonwealth*, Ky.App., 721 S.W.2d 726 (1986).

There is no convincing evidence that defense counsel was impaired when he advised Woodall to plead guilty. There is a letter from counsel's physician stating that the lawyer was physically and emotionally exhausted but that was almost two months before the plea was entered. There was no indication that counsel was impaired during the plea colloquy, nor was health ever raised as an

> issue during the proceedings. The plea was properly accepted by the trial judge.
>
> > The claim by Woodall that he was not informed of the effect of the guilty plea is without merit. The defendant was fully informed of his rights by the trial judge. There is nothing in the record to indicate that he did not have a full and complete understanding of his rights and that he voluntarily chose to plead guilty.
>
> The record indicates that the trial judge carefully explained the factual basis for each charge against Woodall who then admitted his guilt as to all charges. The procedure followed the requirements of *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).

63 S.W.3d 104 (2001). The magistrate judge concludes that the state court's adjudication of the petitioner's claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. The Kentucky Supreme Court found that the claim was not properly preserved for appellate review.

Perhaps the state court based this finding upon the fact that the petitioner filed no motion to withdraw the guilty plea or to vacate the conviction. A federal habeas court may not consider issues that are procedurally defaulted under state law.

2. Any error was harmless because, even if the petitioner had insisted upon going to trial on the issue of guilt/innocence, because the evidence against the petitioner was damning and essentially uncontradicted, there is no reasonable probability that the petitioner would have been found "not guilty."

Eleventh Claim

The petitioner's eleventh claim is that the trial judge abused his discretion by denying a motion for a continuance on June 12, 1998. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> [Woodall] claims that the denial impaired his ability to present a mental health defense and otherwise denied him due process. Woodall was indicted on March 18, 1997 and his trial was set for October 28 of the same year. He sought and was granted a number of relatively routine pretrial continuances, examinations and even a change of venue. The defense received a continuance from February 23, 1998 until April 13 because of the unsatisfactory health of the lead counsel.

On April 10, 1998, three days before the scheduled trial, Woodall entered his guilty plea and sought to continue the penalty phase because he needed the time to assess a mental health defense. The motion for continuance was denied and the night before the penalty phase was to begin, lead counsel was again stricken by illness. An experienced local attorney who had handled several capital cases in the past was appointed to the defense team. On June 12, 1998, she filed a motion for continuance claiming that she could not be prepared because of the complexity of the case. The motion was denied. The trial judge did not abuse his discretion by refusing the motion for continuance.

This Court has stated on several occasions that a trial judge has broad discretion in either granting or denying a continuance. The reviewing court should not reverse a criminal conviction unless the trial judge has abused his discretion in the denial of a continuance. *See Abbott v. Commonwealth*, Ky., 822 S.W.2d 417 (1992) and *Dishman v. Commonwealth*, Ky., 906 S.W.2d 335 (1995) citing *Pelfrey v. Commonwealth*, Ky., 842 S.W.2d 524 (1993).

Woodall claims that his case should be analyzed according to the factors set out

in *Snodgrass v. Commonwealth*, Ky., 814 S.W.2d 579 (1991). We have conducted such an analysis and find that the *Snodgrass* factors all favor the denial of an additional continuance. As observed in *Snodgrass*, a continuance is appropriate in a particular case depending on the unique facts and circumstances of that case.

Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

New counsel for Woodall did not specify the length of the delay in the continuance motion but simply lamented the fact that she had 40 to 50 people to interview and that it obviously would take a very long time. The trial judge had previously noted that the penalty phase was taking place almost 14 months after the crimes had occurred.

Previous continuances had resulted in a delay of almost nine months from the

original trial date to the eventual penalty phase. The claim of medical necessity by the defense is without merit because there were other experienced attorneys who could have been assigned to the case when lead counsel became ill. There was definite inconvenience to the Commonwealth as a litigant because a number of witnesses it planned to call would have been greatly inconvenienced if the trial had been delayed yet again. The trial judge made particular reference to this fact in his denial of the March 30 continuance sought by the defendant. The trial judge indicated that he had a heavy schedule throughout August and September and could not delay the case without serious inconvenience to other litigants on his docket.

The fourth *Snodgrass* factor is whether the delay is purposeful or caused by the accused. Here the record indicates that Woodall challenged the request of the prosecution for a mental health evaluation from the outset of the attempts to evaluate him by seeking a writ of prohibition with the Court of Appeals and ultimately with this Court alleging irreversible injury if he was examined. On January 26, 1998, less than a month before the second scheduled trial date, he changed his position and then

argued for continuance after continuance so he could have more time to prepare a mental health defense. In addition, substitute lead counsel was assigned the case on April 24, 1998 and indicated to the trial judge that she would be prepared by July 14, 1998, even though she realized that this was a death penalty case. We would also note that there was other competent and experienced counsel who was available for the entire year, except for July, and yet no one on the defense team contacted him regarding availability. Eventually the trial judge made the inquiry. Considering the delay factor and the availability of counsel, we cannot find any error in the trial court's ultimate decision.

The complexity of the case does not convince us that there was not sufficient time to prepare. The delay had been at least nine months and the only question was punishment as distinguished from guilt. Finally, there was no identifiable prejudice to Woodall because his counsel had adequate time to investigate his mental condition and to prepare a sufficient defense.

Consequently, as a result of an analysis of the *Snodgrass* factors, we find that the

> trial judge did not abuse his discretion in denying the final motion for continuance.

63 S.W.3d 104 (2001). The magistrate judge concludes that the state court's adjudication of the petitioner's claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. Failure to grant a continuance to enable a defendant to exercise his right to offer testimony of his witnesses can constitute a denial of due process. *Mackey v. Dutton*, 217 F.3d 399, 408 (6th Cir., 2000). When the denial of a continuance forms the basis of a habeas corpus petition, the petitioner must not only show an abuse of discretion, but also must demonstrate that the denial was so arbitrary and fundamentally unfair or arbitrary so as to violate due process. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

2. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." *Id.* However, the Sixth Circuit has held that, in reviewing the denial of a motion for continuance, a court should consider the following factors in determining whether a defendant has been deprived of his rights:

> [T]he diligence in interviewing witnesses and procuring their presence, the

> probability of procuring their testimony within a reasonable time, the specificity with which the defense is able to describe their expected knowledge or testimony, the degree to which such testimony is expected to be favorable to the accused, and the unique or cumulative nature of the testimony.

Mackey, supra.

3. Counsel's vague protestations of need for more time lacked sufficient specificity and likelihood of generating favorable testimony to rise to the level of a denial of due process.

Twelfth Claim

The petitioner's twelfth claim is that the trial judge abused his discretion by denying his motion for funding to conduct a positron emissions tomography (PET) scan and other psychological testing. In affirming his convictions upon direct appeal, the Kentucky Supreme Court disposed of the claim as follows:

> Woodall argues that there was a reasonable necessity for the tests and that he was deprived of due process as a result of the denial.
>
> At a hearing on his motion, Woodall sought funding for the brain imaging procedure known as "Positron Emissions

Tomography" or PET. He alleged that he suffered from various brain disorders and the PET scan would allow an evaluation to be made about certain portions of the brain that may not be functioning appropriately. Dr. Eric Drogin, a psychologist and attorney employed by the defense, testified at the hearing conducted by the trial court. He stated that he had met Woodall twice, once for 5 1/2 hours and another time for 45 minutes. He did not issue a written report on either occasion and he did not do a separate psychological history of Woodall but rather relied on the history provided by the Kentucky Correctional Psychiatric Center (KCPC) as prepared by Dr. Richard Johnson.

The report prepared by KCPC indicated that Woodall had been observed as an inpatient around the clock and a series of clinical and forensic interviews had been conducted by Dr. Johnson. Dr. Johnson testified for Woodall at the penalty phase of the trial and his report was introduced as mitigating evidence.

The Kentucky standard for review of this claim is whether there was a reasonable necessity for funding to conduct additional neuropsychological testing. *Sommers v. Commonwealth*, Ky., 843

> S.W.2d 879 (1992). The trial judge correctly determined that the testimony of defense witness Dr. Drogin was unpersuasive because the psychologist had not spent much time with defendant, had not kept records and had not issued a written report. In addition, he had not done a psychological history of the defendant. The KCPC report specifically eliminated the possibility of organic brain damage. We find no error in the decision of the trial judge in declining to grant a continuance or to allow funding for additional testing. *See Simmons v. Commonwealth*, Ky., 746 S.W.2d 393 (1988), in a case which determined whether the defendant in that matter was competent to stand trial.
>
> We are not persuaded by the reliance on *Binion v. Commonwealth*, Ky., 891 S.W.2d 383 (1995) because it is factually distinguishable. In that case the KCPC report mentioned the possibility of an organic brain defect and there was a strong factual basis for his claim that additional testing was reasonably necessary.

63 S.W.3d 104 (2001). The magistrate judge concludes that the state court's adjudication of the petitioner's claim was not contrary to nor did it involve an

unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. The petitioner argues that his position is supported by *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Durr v. Mitchell*, 487 F.3d 423 (6th Cir., 2007), interpreted *Ake* as follows:

> In *Ake* . . ., the Supreme Court held that an indigent defendant is entitled to expert assistance in two scenarios: (1) where the defendant's sanity at the time of the offense is likely to be a significant factor at trial; or (2) where the prosecution submits evidence of a capital defendant's future dangerousness through the state's own psychiatrists. *Ake*, 470 U.S. at 82-84, 105 S.Ct. 1087 ("The risk of error from denial of [expert] assistance, as well as its probable value, is most predictably at its height when the defendant's mental condition is seriously in question. . . . [This] discussion compels a similar conclusion in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness."); *see also Skaggs v. Parker*, 235 F.3d 261, 272 (6th Cir., 2000) (interpreting Ake to recognize that an indigent defendant is

> entitled to psychiatric assistance during sentencing if sanity was a significant issue at trial or state first presents evidence of future dangerousness).

2. Because the petitioner pled guilty, his sanity at the time of the offenses was not a significant issue at trial. The prosecution did not first present evidence of future dangerousness. Therefore, the petitioner's reliance upon *Ake* is unpersuasive.

3. The state court's determination that a PET scan at the government's expense was not reasonably necessary to the petitioner's defense was entitled to a presumption of correctness.

4. The state court's determination that the trial judge's denial of a PET scan and other psychological testing did not rise to the level of a violation of due process was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Thirteenth Claim

The petitioner's thirteenth claim is that the trial judge erred in failing to hold a competency hearing. In affirming the denial of his RCr 11.42 motion, the Kentucky Supreme Court found the claim to be procedurally defaulted and without merit, to-wit:

> Appellant's claims of error in failing to hold a competency hearing . . . should

> have been raised on direct appeal. We note, however, the trial court, *sua sponte*, ordered a mental health evaluation of Appellant at Kentucky Correctional Psychiatric Center as a "precaution." Dr. Richard Johnson's evaluation revealed that Appellant was competent to stand trial . . . . Furthermore, nothing in the record indicates Appellant . . . is incompetent, and his allegations supporting this claim are speculative.

2005 WL 3131603. The magistrate judge concludes that the claim is procedurally defaulted under state law and that the state court's finding that the claim is without merit was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Fourteenth Claim

The petitioner's fourteenth claim is that the trial judge erred in failing to find him to be mentally retarded. In affirming the denial of his RCr 11.42 motion, the Kentucky Supreme Court found the claim to be procedurally defaulted and without merit, to-wit:

> Appellant's claims of error . . . in failing to find Appellant mentally retarded should have been raised on direct appeal. We note, however, the trial court, *sua sponte*, ordered a mental health evaluation of Appellant at Kentucky Correctional

> Psychiatric Center as a "precaution." Dr. Richard Johnson's evaluation revealed that . . . there was no evidence of mental retardation. Furthermore, nothing in the record indicates Appellant is mentally retarded . . ., and his allegations supporting this claim are speculative.

2005 WL 3131603. The magistrate judge concludes that the claim is procedurally defaulted under state law and that the state court's finding that the claim is without merit was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Fifteenth Claim

The petitioner's fifteenth claim is that trial counsel was constitutionally ineffective for failing to request a competency hearing. In affirming the denial of his RCr 11.42 motion, the Kentucky Supreme Court found the claim to be without merit for the following reasons:

> Appellant first argues trial counsel was ineffective for failing to request a competency hearing . . . . As stated above, Dr. Johnson found no evidence of incompetence . . . . Consequently, failing to pursue these avenues of trial strategy is not ineffective assistance of counsel.

2005 WL 3131603. To be constitutionally ineffective, counsel's performance must have been deficient, and

the deficiency must have been prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). The magistrate judge concludes that the state court's finding that the claim is without merit under the first prong of the *Strickland* test was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Sixteenth Claim

The petitioner's sixteenth claim is that trial counsel was ineffective for failing to raise his mental retardation as an issue. In affirming the denial of his RCr 11.42 motion, the Kentucky Supreme Court found the claim to be without merit for the following reasons:

> Appellant first argues trial counsel was ineffective for . . . failing to raise mental retardation as an issue. As stated above, Dr. Johnson found no evidence of . . . mental retardation. Consequently, failing to pursue these avenues of trial strategy is not ineffective assistance of counsel.

The magistrate judge concludes that the state court's finding that the claim is without merit under the first prong of the *Strickland* test was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Seventeenth Claim

The petitioner's seventeenth claim is that trial counsel was ineffective for forcing him to enter a guilty plea, and then later for failing to move to withdraw the plea. In affirming the denial of his RCr 11.42 motion, the Kentucky Supreme Court found that "[t]his argument was raised and disposed of on direct appeal, and Appellant is barred from shrouding his involuntariness claim as ineffective assistance of counsel." 2005 WL 3131603. The magistrate judge concludes that the state court's finding that the petitioner's ineffectiveness claim is without merit because it was voluntarily, intelligently, and knowingly entered was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Eighteenth Claim

The petitioner's eighteenth claim is that counsel was ineffective for failing to present additional mental health expert testimony in support of a third continuance prior to the April 1998 trial date. In affirming the denial of his RCr 11.42 motion, the Kentucky Supreme Court found that counsel did not perform deficiently for the following reasons:

> Counsel presented the testimony of one psychiatric expert, but Appellant claims it was not enough. When claiming ineffective assistance, Appellant may not base his claims merely on the fact that a

> defense tactic was unsuccessful. [*Strickland v. Washington*, 466 U.S. 668, 690 (1984)]. We find the testimony of one expert on the subject to be sufficient and reasonable assistance of counsel.

2005 WL 3131603. The magistrate judge concludes that the state court's finding that counsel was effective under the first prong of the *Strickland* test was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Nineteenth Claim

The petitioner's nineteenth claim is that counsel was ineffective for failing to present an insanity defense. In affirming the denial of his RCr 11.42 motion, the Kentucky Supreme Court found that counsel did not perform deficiently for the following reasons:

> We address the next four claims together, as they all relate to mental health evaluation. Appellant claims counsel was ineffective for failing to present an insanity defense, an extreme emotional disturbance defense, a genetic defect defense, and failing to pursue further neurological testing. We find all of these claims are without merit.
>
> Defense counsel chose a trial strategy which is not subject to second-guessing at

this time. It was reasonable for defense counsel to rely on Dr. Johnson's evaluation, as well as the testimony of other mental health experts. *See* [*Haight v. Commonwealth*, 41 S.W.3d 436, 441, 447 (Ky. 2001)]. Appellant opines that trial counsel failed to investigate this plethora of mental health defenses.

The decision not to investigate must be professionally reasonable under the circumstances, and the reviewing court gives great deference to trial counsel's decisions. *Strickland, supra* at 691. In this case, defense counsel's decisions were objectively reasonable, and Appellant relies on hindsight to claim counsel used the wrong strategy. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. . . ." *Id.* at 689. Even if defense counsel had put forth each of these mental health claims, Appellant still would not be entitled to relief pursuant to the standard set forth in *Strickland*. FN1 As a result, we find Appellant's allegations do not rise to the level of ineffective assistance of counsel.

FN1. "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . .

> would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland, supra* at 695.

The magistrate judge concludes that the state court's finding that counsel was effective was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Twentieth Claim

The petitioner's twentieth claim is that counsel was ineffective for failing to present a genetic defect defense. The magistrate judge concludes that the state court's disposition of the claim was not contrary to our standard of review for the same reasons discussed in connection with the petitioner's nineteenth claim.

Twenty-First Claim

The petitioner's twenty-first claim is that counsel was ineffective for failing to pursue further neurological testing. The magistrate judge concludes that the state court's disposition of the claim was not contrary to our standard of review for the same reasons discussed in connection with the petitioner's nineteenth claim.

Twenty-Second Claim

The petitioner's twenty-second claim is that, although defense counsel offered the jury evidence of

his fecal incontinence, counsel was ineffective in failing to convince the jury that he did not deserve the death penalty. In affirming the denial of his RCr 11.42 motion, the Kentucky Supreme Court found that counsel did not perform deficiently for the following reasons:

> Appellant's next three claims focus on mitigation evidence presented by the defense Appellant acknowledges defense counsel offered the jury evidence of Appellant's fecal incontinence, squalid upbringing, and childhood sexual abuse. Appellant argues, however, that defense counsel was ineffective in convincing the jury that Appellant did not deserve the death penalty. The record reflects that defense counsel acted reasonably, and advocated Appellant's plight as appropriate under the circumstances. Furthermore, even if defense counsel had been a more zealous advocate of this evidence, it still would not create a reasonable probability the jury would have returned a lesser sentence. Accordingly, we find no ineffective assistance of counsel.

The magistrate judge concludes that the state court's finding that counsel was not ineffective was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Twenty-Third Claim

The petitioner's twenty-third claim is that, although defense counsel offered the jury evidence of his squalid upbringing, counsel was ineffective for failing to convince the jury that he did not deserve the death penalty. The magistrate judge concludes that the state court's disposition of the claim was not contrary to our standard of review for the same reasons discussed in connection with the petitioner's twenty-second claim.

Twenty-Fourth Claim

The petitioner's twenty-fourth claim is that, although defense counsel offered the jury evidence of his childhood sexual abuse, counsel was ineffective for failing to convince the jury that he did not deserve the death penalty. The magistrate judge concludes that the state court's disposition of the claim was not contrary to our standard of review for the same reasons discussed in connection with the petitioner's twenty-second claim.

Twenty-Fifth Claim

The petitioner's twenty-fifth claim is one of juror misconduct based upon an affidavit of one of the jurors in the sentencing trial to the effect that she brought prejudicial extraneous Bible verses relating to capital punishment into the jury room and provided the material to other jurors. In affirming the denial of the petitioner's CR 60.02 claim, the Supreme Court of Kentucky found that the claim is procedurally barred

under state law and without merit. The Kentucky Supreme Court characterized the claim as follows:

> Appellant's CR 60.02 claim stems from an affidavit signed by Juror H, a juror in the sentencing trial, stating she looked up Bible verses relating to capital punishment on the Internet, printed them out, and brought the verses to the jury room during deliberations. Appellant argues Juror H brought prejudicial extraneous information into the jury room and provided the material to other jurors. Juror H's affidavit, however, states she does not know if any other jurors actually looked at her Bible verses, and she is not exactly sure which day of the sentencing trial she took the verses to court.

2005 WL 2674989. The Kentucky Supreme Court prefaced its finding that the claim is procedurally barred upon the following chronology:

> It is necessary to consider the chronology of the post-conviction events. The United States Supreme Court denied certiorari on October 7, 2002. Thereafter, the governor signed a death warrant with an execution date of December 10, 2002. As a result, Appellant claims he was "forced by the Commonwealth" to file an RCr 11.42 motion in a short period of time. In his RCr 11.42 motion Appellant made no

> allegations of juror misconduct, although one juror, Juror M, had been interviewed at that time. Juror M gave Appellant no information favorable to his argument as she stated there was no juror misconduct, extraneous prejudicial information, or improper outside influence.
>
> After the unfavorable interview with Juror M, Appellant alleged other claims in his RCr 11.42 motion, which he filed December 3, 2002, seven days before his scheduled execution date. Pursuant to this filing, the execution date was set aside until Appellant's pending claims could be resolved. The trial court denied Appellant's motion to vacate the death sentence pursuant to RCr 11.42 on April 22, 2003. Appellant's investigators interviewed Juror H on May 31, 2003. She executed a "preliminary" affidavit on June 9, 2003, and signed a "cleaned-up" affidavit on September 10, 2003. Appellant filed a claim pursuant to CR 60.02(f) on June 1, 2004.

The Kentucky Supreme Court found that the claim is procedurally barred for the following reasons:

> First, we analyze the standard by which CR 60.02(f) relief is granted. The rule allows a trial court to set aside a final judgment for "any other reason of an

extraordinary nature justifying relief." CR 60.02(f). Our leading case on CR 60.02 is *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky.1983). Procedurally, Gross requires Appellant to first seek relief pursuant to RCr 11.42 and to "state all grounds for holding the sentence invalid of which the movant has knowledge" in the RCr 11.42 proceedings. *Id.* at 856 (quoting RCr 11.42(3))(emphasis added). Thereafter, a defendant may request extraordinary relief pursuant to CR 60.02, but may not rehash arguments that were or should have been raised on direct appeal or pursuant to RCr 11.42. *Id.*

In this case, Appellant argues that a "premature" death warrant prevented him from fully developing and investigating all of his claims prior to the filing of the RCr 11.42 motion. We find this claim to be unconvincing. The death warrant was not "premature" in this case because the Governor is authorized to set a date of execution at any time after a death sentence has been affirmed. KRS 431.218. It is not within our power to disturb the Governor's policy on such matters. *Bowling v. Commonwealth*, 926 S.W.2d 667, 669 (Ky.1996).

Moreover, as noted in *Baze v. Commonwealth*, 23 S.W.3d 619, 623 (Ky.2000), "[A]ppellant had over fourteen months from the issuance of this Court's opinion affirming his conviction to prepare an RCr 11.42 motion." FN1 Thus, Appellant has set forth no valid excuses for waiting until three weeks before his scheduled execution to interview Juror M. Ostensibly, once Juror M stated there was no wrongdoing by jurors, Appellant apparently chose not to pursue any other interviews as a matter of strategy.

FN1. This Court's opinion affirming Appellant's death sentence was issued August 23, 2001. The United States Supreme Court denied certiorari on October 7, 2002.

Finally, even if Appellant's counsel did not feel there was sufficient time to fully investigate potential juror misconduct before filing the RCr 11.42 motion, an amendment to that motion could have been filed after further investigation. As we recognized in *Bowling*, the nature of an RCr 11.42 motion is that it must be both speedy and specific, and accordingly, " 'leave [to amend] shall be freely given when justice so requires." ' *Bowling*, *supra*, at 670 (quoting CR 15.01). Thus, for the reasons set forth herein,

> Appellant's CR 60.02 claim is procedurally barred since the issue set forth within it should have been raised in his RCr 11.42 motion. *Gross, supra,* at 857 ("The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings.").

The Kentucky Supreme Court found that the claim is without merit for the following reasons:

> Even if Appellant's claims were not procedurally barred, relief would not be available, as his allegations are without merit. However, because this is a death penalty case, we will nonetheless address Appellant's juror misconduct claim.
>
> Appellant argues the trial court erred in finding that RCr 10.04 is a barrier to relief. The rule states "[a] juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." RCr 10.04. The trial court has great latitude in deciding whether to grant a new trial, and the decision is disturbed only for abuse of discretion. *Jillson v. Commonwealth*, 461 S.W.2d 542, 545 (Ky.1970). We find the trial court properly denied Appellant's

request for a new trial and correctly relied upon RCr 10.04 to bar juror testimony.

Appellant contends that the testimony of Juror H regarding what may have occurred in the deliberation room warrants a new trial. RCr 10.04 and the accompanying case law recognize that a juror's testimony regarding deliberations cannot be used to impeach the verdict. *See Hicks v. Commonwealth*, 670 S.W.2d 837, 839 (Ky.1984); *Grace v. Commonwealth*, 459 S.W.2d 143 (Ky.1970); *Bowman v. Commonwealth*, 284 Ky. 103, 143 S.W.2d 1051, 1054 (1940).

Appellant argues his case is similar to *Ne Camp v. Commonwealth*, 311 Ky. 676, 225 S.W.2d 109 (1949). In *Ne Camp*, a juror consulted with a priest regarding the moral implications of imposing the death penalty, and then told another juror during deliberations that the priest advised it was not a moral sin. *Id.* at 111-12. The *Ne Camp* Court found juror misconduct "obvious" and reversed the judgment of the trial court. *Id.* at 112.

Appellant relies upon *Ne Camp* because the Court accepted juror testimony regarding juror misconduct during deliberations. However, we find

Appellant's reliance to be misplaced. In *Gall v. Commonwealth*, 702 S.W.2d 37, 44 (Ky.1985), this Court distinguished *Ne Camp*, stating, "*Necamp* does not sanction examination of jurors to search for inconsistencies in their deliberations. *Necamp* only addresses the issue of jurors who consult with others and carry their advice into the jury room." *Id.*

We find the reasoning of *Gall* applicable here. In this case, aside from Juror H's uncorroborated affidavit, there is no evidence establishing what was actually brought into the jury room or that any other juror was affected by the presence of these materials. Juror H stands alone in her allegations, and we find such singular evidence to be insufficient to prove juror misconduct in this instance.

Conversely, there was sufficient evidence for the jurors to reach an impartial, unanimous decision imposing the death penalty, especially in light of Appellant's voluntary guilty plea to the heinous murder of Sarah Hansen. The relevant public policy concerns of finality of a jury verdict, protecting jurors from continued post verdict interference, and maintaining the integrity of the jury trial system would be undermined if lone jurors were routinely permitted to second-guess the

> deliberative process once the trial is over. After the trial is over, the collective jury decisional process no longer exists. Accordingly, we find no abuse of the trial court's discretion, and agree that RCr 10.04 bars the proffered juror testimony in this case.

2005 WL 2674989. The magistrate judge concludes that the claim is procedurally defaulted under state law and that the state court's finding that the claim is without merit was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

In so finding, the undersigned has been guided by the following principles:

1. This court is not in a position to second-guess the state court's determination that the claim was procedurally defaulted under state law.

2. Even if there was some misconduct on the part of Juror H in obtaining copies of Bible verses for herself and other jurors, a federal habeas court will "review constitutional errors at trial such as Sixth Amendment violations [predicated upon juror misconduct] under a harmless error standard. . . . The habeas petitioner must show that the trial error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Mason v. Mitchell*, 320 F.3d 604, 638 (6th Cir., 2003)

quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

3. The petitioner has failed to show that the Bible verses in question failed to present both sides of the issue and/or prevented any member of the jury from following the instructions given by the court.

4. The jury was instructed to base its decision on the facts and the law as stated by the judge. A reviewing court should presume that jurors follow their instructions. *See Kansas v. Marsh*, 548 U.S. 163 (2006) ("jurors [are] presumed to follow their instructions") and *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (applying "the almost invariable assumption of the law that jurors follow their instructions").

5. Federal habeas courts have held that, even assuming that it was misconduct for a jury to consider, during the penalty phase of a capital case, Biblical references that bore on the propriety of a death penalty, these references had no substantial and injurious effect. *See*, for example, *Fields v. Brown*, 503 F.3d 755 (9th Cir., 2007), and cases cited therein.

Twenty-Sixth Claim

The petitioner's twenty-sixth claim is that Juror H's uncorrected misconduct was tantamount to an Establishment Clause violation of the First Amendment because a juror is deemed to be a state actor. The petitioner has cited no authority for the proposition that juror misconduct involving Bible

verses may constitute a violation of the Establishment Clause, and the undersigned is unaware of any such authority. The magistrate judge concludes that the petitioner's argument is unprecedented and unpersuasive.

Twenty-Seventh Claim

The petitioner's twenty-seventh claim is that the death penalty is a disproportionate punishment as applied in his case. In affirming his convictions upon direct appeal, the Kentucky Supreme Court found that the claim was not cognizable from the standpoint of the United States Constitution for the following reasons:

> Specifically, [Woodall] claims that this Court should conduct a proportionality review and rule that his sentence is disproportionate because other criminal defendants who have committed similar crimes under similar circumstances were able to avoid the death penalty.
>
> The United States Supreme Court has rejected the idea that this specific form of proportionality review is constitutionally required. *See Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). The Sixth Circuit has also rejected the argument in *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir., 1996).

63 S.W.3d 104. The Kentucky Supreme Court found that the death sentence was not disproportionate as a matter of state law:

> However, this Court, pursuant to KRS 532.075 has reviewed the death sentence imposed in this case and concludes that it was not fixed under the influence of passion, prejudice or any other arbitrary factor. The evidence supports the finding of an aggravating circumstance. We have considered whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, as required by statute and have considered all circumstances of the crime committed here, and all of the evidence surrounding the defendant and his background. The information used in considering this penalty has been compiled in accordance with KRS 532.075(6)(a)(b) and (c). We have considered all the cases in which the death penalty was imposed since 1970 involving both the crime and the defendant. On the basis of this review, we have determined that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases considering both the crimes and the defendant.

The magistrate judge concludes that the petitioner's claim is not cognizable in a federal habeas corpus

petition. *See* 28 U.S.C. § 2254(a) (a federal court may "entertain an application for a writ of habeas corpus . . . only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

Twenty-Eighth Claim

The petitioner's twenty-eighth claim is a variation on the following issue that was decided upon direct appeal by the Kentucky Supreme Court:

> The trial judge properly relied on nonstatutory aggravating factors to enhance the sentence. Woodall claims that such use is unconstitutional. Similar arguments have been rejected by this Court in *Matthews v. Commonwealth*, Ky., 709 S.W.2d 414 (1986); *Mills v. Commonwealth*, Ky., 996 S.W.2d 473 (1999) and *Tamme v. Commonwealth*, Ky., 973 S.W.2d 13 (1998). The use of nonstatutory aggravating circumstances is permissible as long as the jury makes the required finding that at least one statutory aggravating circumstance exists. We find no error in this respect.

63 S.W.3d 104. The petitioner now argues that the factors relied upon by the trial judge were "unconstitutionally vague." The petitioner does not dispute that the jury made the required finding that at least one statutory aggravating circumstance exists.

Therefore, the trial judge's reliance upon other factors, whether vague or not, was immaterial. The magistrate judge concludes that the state court's adjudication of the petitioner's claim was not contrary to nor did it involve an unreasonable application of United States Supreme Court precedents.

Twenty-Ninth Claim

The petitioner's twenty-ninth claim is that he is incompetent to be executed. In his reply to the respondent's response to the petition, the petitioner apparently concedes that in light of *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007), which was decided after the present petition was filed, the claim is not "ripe" for adjudication at the present time and will not be "ripe" until his mental state can be determined near the time of execution (Docket Entry No. 21, p. 132). The petitioner asks that the claim be dismissed without prejudice.

Thirtieth Claim

The petitioner's thirtieth and final claim is one of cumulative error. The magistrate judge concludes that the claim is without merit because he has failed to show any errors to accumulate. Furthermore, "the law of this Circuit is that cumulative error claims are not cognizable on habeas." *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir., 2006).

RECOMMENDATION

The magistrate judge RECOMMENDS that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket Entry No. 6) be DENIED.

January 29, 2008

s/W. David King
W. David King
United States Magistrate Judge

NOTICE

Pursuant to 28 U.S.C. § 636(b)(1), any party shall have a period of ten (10) days, excluding intervening Saturdays, Sundays, and/or legal holidays pursuant to Fed.R.Civ.P. 6(a), from the date of notice of electronic filing within which to file written objections to the foregoing report with the Clerk of the Court. Further and pursuant to Fed.R.Civ.P. 72(b), any party may file a response to objections filed by another party within ten (10) days, excluding Saturdays, Sundays, and/or intervening legal holidays, after being served with a copy of said objections. A period of three days shall be added to each ten (10) day period above pursuant to Fed.R.Civ.P. 6(e).

The original objections shall be sent to the Clerk of Court either electronically or by mail. A copy of any objections and response thereto shall be served on the undersigned at Suite 330, 501 Broadway, Paducah, Kentucky, 42001 or via e-mail to w_david_king@kywd.uscourts.gov. Failure of a party to file timely objections shall constitute a waiver of the right to appeal by that party. *Thomas v. Arn*, 474 U.S. 140 (1985).

January 29, 2008

s/W. David King
W. David King
United States Magistrate Judge

AMENDED: January 15, 2002
RENDERED: August 23, 2001
TO BE PUBLISHED

Supreme Court of Kentucky

1998-SC-0755-MR

ROBERT KEITH WOODALL APPELLANT

APPEAL FROM CALDWELL CIRCUIT COURT
V. HON. BILL CUNNINGHAM, JUDGE
97-CR-00053

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

AFFIRMING

Robert Keith Woodall appeals from a sentence of death for murder and life imprisonment for the rape and kidnapping of Sarah Hansen. Woodall entered a plea of guilty to capital murder, capital kidnapping, and first-degree rape. A jury sentencing trial was conducted July 14 through July 20, 1998. The prosecution called eleven witnesses, and the defense presented fourteen witnesses in mitigation of the crimes. Woodall did not testify at the penalty proceedings. The jury fixed a sentence of death for the

capital murder and a sentence of two concurrent life terms for the kidnapping and rape.

The victim was a 16-year-old high school cheerleader, an honor student, a musician, a member of the National Honor Society and the Beta Club and a medalist in swimming and diving. On January 25, 1997, she had planned to watch a video with her boyfriend. She went to the local mini-mart to rent a movie, leaving her home between 7:30 p.m. and 8:00 p.m., never to be seen alive again by her family. At 10:42 p.m., two police officers were dispatched to search for the victim. Thereafter, they found the minivan that she had been driving in a ditch at Luzerne Lake, approximately 1.5 miles from the mini-mart. The officers followed a four to five hundred foot trail of blood on a gravel roadway from the van. The unclothed body of the victim was found floating in the water. Her throat had been slashed twice with each cut approximately 3.5 to 4 inches long. Her windpipe was totally severed. She actually died of drowning.

The police questioned Woodall when they learned that he had been in the minimart on Saturday night. He gave two conflicting statements about his activities on the night of the murder after he left work. The police observed that Woodall was wearing a brand of tennis shoe similar to the imprint on the pier next to where the body of the victim had been found. His fingerprints were on the van the victim was driving. Blood was found on his front door and muddy and wet clothing under his bed. Blood on his clothing and sweatshirt were consistent with the blood of the victim.

The DNA on the vaginal swabs was consistent with his. His fingerprints were identified on the glass and door of the van as well as the interior doorjamb and handle. On March 18, 1997, the Muhlenberg County Grand Jury indicted him for murder, kidnapping and rape. One week later, the Commonwealth announced its intention to seek the death penalty. Venue for the prosecution was changed from Muhlenberg to Caldwell County because of massive publicity.

On appeal, Woodall raises 28 assignments of alleged error. We have carefully reviewed all the issues presented and this opinion will concentrate first on those issues that were orally argued. All the allegations presented will be discussed.

I. No Adverse Inference Instruction

Woodall argues that he was denied due process, his right not to testify and a reliable sentence determination when the trial judge refused to instruct the jury to draw no adverse inference from the decision of Woodall not to testify during the penalty trial. Woodall pled guilty to all of the charged crimes as well as the aggravating circumstances. The no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. That is not the situation presented here. The instruction contemplated by *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) could not have changed the outcome of a guilty determination that the defendant acknowledged

by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.

There is no error in this respect. Any possible error would be nonprejudicial because the defendant admitted the crimes and the evidence of guilt is overwhelming. Woodall claims that *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), extended Fifth Amendment protection and thus the *Carter, supra*, rule to the penalty phase of a trial. *Estelle, supra*, is not a jury instruction case, unlike *Carter*. *Estelle* does not cite to *Carter* or indicate that *Carter* has been extended. The factual situation in *Estelle* is different from that presented in this case because it involved the use of an out-of-court statement the defendant made to a government expert. The statement in that case was in regard to a psychological examination by the government prosecutors which was used against the defendant without warning in the penalty trial. Neither *Carter* nor *Estelle* involved a guilty plea. Here, Woodall admitted guilt to all charges and did not contest the facts. He was not compelled to testify so there were no words that could be used against him so as to implicate the Fifth Amendment privilege as in *Estelle*.

Woodall contends that *Mitchell v. United States*, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) permits a guilty plea which does not waive the privilege against self-incrimination at the sentencing phase. *Mitchell, supra*, does not apply here. In *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of

cocaine and of distributing cocaine within 1000 feet of a school or playground. She reserved the right to contest the amount of the cocaine at the penalty phase. The amount of the cocaine would determine the range of penalties. She only admitted that she had done "some of" the conduct charged. She did not testify. Three other codefendants did testify as to the amount of cocaine she had sold. Ultimately, the U.S. Supreme Court ruled that it would not permit a negative inference to be drawn about her guilt with regard to the factual determination respecting the circumstances and details of the crime. Here, Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes.

The decision of the trial court not to give an adverse inference instruction does not amount to constitutional error so as to require reversal. There is no violation of any section of the United States or Kentucky Constitution.

II. Restrictions on Voir Dire

Woodall contends that the trial judge placed excessive and unfair restrictions on his ability to develop information about jurors on voir dire and as a result, his right to exercise peremptory challenges intelligently and his guarantee of a fair and impartial jury were violated. He claims that the trial judge repeatedly and severely curtailed his ability to question jurors during voir dire. There can be no question that an adequate voir dire examination is essential to the seating of a fair and impartial jury.

This is particularly true in a death penalty case where an adequate voir dire process has been held to be mandatory. *Morris v. Commonwealth*, Ky., 766 S.W.2d 58 (1989).

A) It was not an abuse of discretion by the trial judge to restrict the voir dire of Woodall concerning specific mitigation evidence which he planned to present. The trial judge permitted Woodall to ask general mitigation questions, but prohibited questions about specific mitigating factors such as the low I.Q. attributed to Woodall. Federal courts have recognized that denying a defendant the right to voir dire jurors on specific mitigating factors is not an abuse of discretion. *See U.S. v. Tipton*, 90 F.3d 861 (4th Cir. 1996); *U.S. v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998).

As in *Tipton, supra*, Woodall sought to question the jury about specific mitigating circumstances rather than a generalized inquiry as allowed by the trial judge. Here, the trial judge had asked jurors on individual voir dire whether they were willing to consider the entire range of penalties and had also asked them if they were willing to consider mitigating evidence. The judge permitted Woodall to question jurors extensively regarding mitigating circumstances so long as the questions were general and did not inquire into specific mitigation. The trial judge has broad discretion in the area of questioning on voir dire. *Ward v. Commonwealth*, Ky., 695 S.W.2d 404 (1985). Questions are not competent when their evident purpose is to have jurors indicate in advance or to commit themselves to certain ideas and views upon

final submission of the case to them. *Ward, supra.* The mere fact that more detailed questioning might have somehow helped the accused in exercising peremptory challenges does not suffice to show abuse of the discretion in conducting the examination. *See Tipton, supra; see also, Annotation,* "Propriety and Effect of Asking Prospective Jurors Hypothetical Questions, on Voir Dire, as to How They Would Decide Issues of the Case." 99 A.L.R. 2d 7; *see also Commonwealth v Moon,* 132 A.2d 224 (Pa. 1957), cert. dismissed, 355 U.S. 908, 18 S.Ct. 335, 2 L.Ed.2d 270; *Commonwealth v. Everett,* 396 A.2d 645 (Pa. 1978).

Woodall was trying to get jurors to indicate in advance what their views were regarding his I.Q. of 74. He was seeking to oblige jurors to commit themselves by either accepting a specific mitigator or rejecting it before any evidence was heard. The trial judge was attempting to protect against such danger and did not abuse his broad discretion. It should be recalled that in 1991, I.Q. testing measured Woodall's I.Q. at 74, and in 1998, a prosecution psychologist measured his full-scale I.Q. at 78. Both scores are 4 to 8 points respectively higher than the definition of a seriously mentally retarded offender as found in KRS 532.130 (2). KRS 532.140 does not permit execution of a person below an I.Q. of 70.

B) Woodall complains that the trial judge abused his discretion by denying voir dire examination into the attitudes of the jurors regarding the right of Woodall to remain silent. We disagree. The trial judge correctly refused to allow proposed questions on the Fifth

Amendment rights of the accused. There was no error on the part of the trial judge in this respect and in any event, it is nonprejudicial and harmless beyond a reasonable doubt as noted earlier.

C) It was not an abuse of discretion for the trial judge to deny extensive voir dire examination into the views of the jurors regarding capital punishment. Initially the trial judge examined the jurors on the entire range of penalties from 20 years to death. Woodall was also given the opportunity to voir dire the jurors in a like manner. The individual voir dire required by RCr 9.38 by both the trial judge, counsel for the defendant and the prosecutor was adequate. The general and individual examination of each juror conducted by the trial judge was sufficient and satisfied the rule requiring that defense counsel be permitted to ask questions regarding capital punishment.

D) It was not error for the trial judge to deny Woodall an opportunity to voir dire on the subject of whether the jury must be unanimous in its findings of mitigation. Again, the trial judge has broad discretion to supervise the voir dire examination. If there was any confusion in the mind of the jury about mitigating circumstances at the voir dire stage, it was clearly resolved by the jury instructions which were proper. It was clear to the jurors that if one of them believed that Woodall did not deserve the death penalty, they could not return a verdict of death. The trial judge did not abuse his discretion by not permitting further inquiry by Woodall in this regard.

E) The refusal of the trial judge to permit defense counsel to voir dire potential jurors on their opinions about the differences in the burden of proof for mitigating circumstances and aggravating circumstances does not amount to reversible error. Mitigating circumstances do not have to be proven beyond a reasonable doubt. *See Mills v. Marvland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). On the other hand, KRS 532.025(3) requires aggravating circumstances to be proved beyond a reasonable doubt. Such a difference is not a disparity which would give rise to either a challenge for cause or a peremptory.

F) The denial by the trial judge of voir dire questions as to whether the jurors believed the death penalty was necessary does not constitute reversible error. The trial judge prohibited defense counsel from asking the question, "Do you feel the death penalty is a necessary punishment." The trial judge did not violate his broad discretion in such matters.

G) Woodall argues that whether jurors can base their verdict on evidence is a separate inquiry from whether they can consider minimum sentences. He contends that the qualification placed on the questioning about the ability to consider minimum sentences was improper. The trial judge directed that the jurors only had to be able to consider a minimum sentence "if warranted by the evidence," and that such qualifications on the question were designed to conceal bias and not to disclose it.

Again, there is no question that Woodall is entitled to a jury that can fairly consider the entire range of punishments for his crimes. *Grooms v. Commonwealth*, Ky., 756 S.W.2d 131 (1988). It was proper for the trial judge to make it abundantly clear to the jurors that they must consider their verdict in light of the instructions given to them by the court and the evidence presented. The qualifying language required by the trial judge was proper and made it clear that if the instructions and the evidence so warranted, they could consider a minimum penalty. That is all that is required by the law. *See Hodge v. Commonwealth*, Ky., 17 S.W.3d 824 (2000); *Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1993).

H) It was not an abuse of discretion for the trial judge to refuse to permit Woodall to ask certain questions on the jury personal data questionnaire because many of those questions had either been already asked by the judge or counsel or were improper in any event. Prior to the entry of the guilty plea, the trial judge had spontaneously prepared a questionnaire and mailed it to jurors. Illness required that the original defense counsel be replaced by new defense counsel and the new defense counsel requested that the same juror questionnaire be sent to potential jurors for the sentencing hearing.

Woodall complains his right to an impartial jury was compromised when the trial judge refused to allow him to ask certain questions in voir dire that the trial judge had previously listed on a pretrial questionnaire that the judge intended to send to all jurors. Woodall

complains because some of the questions he tendered to the court in a pretrial motion were not allowed. There was no abuse by the trial judge of his broad discretion on issues involving voir dire. *Ward, supra.* The trial judge made clear his grounds for refusing to allow certain questions to be asked. The jury questionnaire form already contained general questions regarding occupation and other questions were considered to be too invasive when balanced against the limited amount of information they were likely to provide. The trial judge did not abuse his discretion in any respect.

III. Jurors Not Struck for Cause

Woodall argues that the trial judge abused his discretion by failing to strike six allegedly unqualified jurors for cause and thereby violated his right to an impartial jury and impaired his use of peremptory challenges. Woodall used all ten of his peremptory challenges; three of the peremptory challenges were exercised on jurors he had sought to remove for cause. He also unsuccessfully challenged for cause three of the twelve jurors who sat on the case. Motions to strike jurors for cause are within the sound discretion of the trial judge. *Bowling, supra.*

In regard to Juror 278, the allegation that she was impaired because her sister had been raped is without merit. The refusal to strike jurors for cause because they had previously been victims of violent crimes has been repeatedly upheld. *See Hodge; Stoker v. Commonwealth,* Ky., 828 S.W.2d 619 (1992). Here, the

crime victim was the juror's sister rather than herself. There was no cause for strike.

It was never established that the employment of the juror at the Kentucky State Penitentiary gave her any special knowledge about parole, and there is no authority for the proposition that mere knowledge about parole eligibility is a basis for a challenge for cause. The trial judge recognized the fact that the potential juror was taking antidepressant medication and properly believed that she could serve if necessary. *Bowling, supra.* There was no abuse of discretion in regard to the potential juror. The contention that the juror was biased because her daughter's band competed against the victim's band was unsupported by the record.

Juror No. 176 possessed no special knowledge that could have influenced other jurors. The argument that the juror was situationally impaired because she had worked at the mini-market for one month more than six months after the crime occurred is without merit. The juror specifically denied on voir dire that she knew one of the prosecution witnesses and there was no evidence to substantiate the claim by Woodall. The juror indicated on voir dire that any conversation she may have had with fellow workers at the mini-mart were of a general nature. There was no abuse of discretion in refusing to strike the juror for cause.

Juror No. 94. Woodall argues that the juror should have been struck for cause because she could not consider a minimum sentence. The record shows that

the juror indicated on two different occasions that she could consider the entire range of penalties. In response to the trial judge's question of whether she could consider a twenty-year sentence if so instructed, she answered she could if it were supported by the evidence. Although a juror is disqualified if he or she cannot consider the minimum penalty pursuant to *Grooms, supra*, excusal for cause is not required merely because the juror favors severe penalties, so long as he or she will consider the full range of penalties. *Hodge, citing* Bowling. Per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination. *Hodge*.

Woodall claims that Juror No. 185 should have been excused for cause pursuant to KRS 29A.080(2)(d) because he had an insufficient knowledge of the English language and was unable to understand what was being said in voir dire. Woodall also argues that the juror never indicated whether he could consider I.Q. of 74 of Woodall as a mitigating factor. No. 185 sat as a juror. He stated on two separate occasions that he could consider mitigating evidence and follow the instructions of the trial judge on mitigating evidence. During voir dire, the juror stated he could consider someone's stability as a mitigating circumstance. There was no abuse of discretion in denying the motion to strike for cause.

Juror No. 16 was removed from the case by peremptory challenge after a motion to strike for cause had been denied. Woodall claims that the juror was

impaired because he could not consider mitigating evidence. Although the juror may have been temporarily confused on voir dire, he finally indicated that he would consider mitigating evidence, "If the court instructs me that way." The juror satisfied the requirements of *Grooms, supra,* and the trial judge did not abuse his discretion in refusing to strike the juror for cause.

Potential Juror No. 8 was peremptorily challenged after the trial judge had refused to strike him for cause. Woodall complains that the motion for cause was denied because the juror had properly answered what he labels as the "leading questions" by the judge about considering the entire range of punishment. When initially asked if he could consider a 20-year minimum sentence, the jurors answered "I don't know," and later proclaimed that he was for the death penalty. After appropriate rehabilitation by the trial judge, the juror indicated that he would base any decision in the case as to punishment on the evidence presented. The trial judge did not use leading questions in order to elicit such an answer. The proscription provided in *Montgomery v. Commonwealth,* Ky., 819 S.W.2d 713 (1991), is not applicable.

The refusal of the trial judge to strike jurors for cause did not violate the right to a fair and impartial jury and did not unnecessarily compromise his use of the allotted peremptory challenges.

IV. Jurors Who Should Not Have Been Struck for Cause

Woodall claims that the trial judge abused his discretion by striking two potential jurors for cause and that the alleged wrongful exclusion of the jurors is not subject to a harmless error analysis. We will refer to the two jurors in question as the first juror and the second juror in order to respect their privacy as we have done with the jurors in the previous section of this Opinion.

Initially, we must observe that jurors who are substantially impaired in their ability to impose a death sentence may be excused for cause. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

After an exhaustive examination of the record in regard to the first potential juror, we conclude that the trial judge did not abuse his discretion in excusing her for cause. The potential juror was relatively articulate and knowledgeable about the different range of penalties available in the case. She expressed a considerable interest in a penalty of life in prison for 25 years without hope of parole. Near the end of the voir dire by the prosecution, she clearly stated that she did not like capital punishment and that she would not consider it period. Although the potential juror was 78 years old, she seemed to be in full command of her faculties and knowledgeable about the legal system.

The second juror indicated a hesitancy and an ambivalence about the death penalty. When asked if he could consider the range of possible punishments, including death, he answered "No sir, I don't think I could do that." Later, when asked if he could consider death if the judge instructed the jurors to give each one fair consideration, the juror answered, "I don't think I consider the death penalty as far as something like that, no sir." The second juror was struck for cause and the defense made no objection. Both jurors were properly struck for cause.

V. Batson Issue

Woodall argues that he was denied due process and equal protection of the law because the trial judge failed to conduct an inquiry into and make findings of fact concerning the alleged discriminatory intent and credibility of the reasons given by the prosecutor for a peremptory challenge of the only African American in the final jury pool. At the conclusion of the voir dire examination, only one African American remained in the jury pool. The other African American called for jury duty had been challenged and removed for cause. No motion was made to strike the remaining juror for cause but the prosecution exercised a peremptory strike against her. In a response to an objection by the defense, the prosecutor stated that the juror had been struck because she answered a question on a jury questionnaire to the effect that she "did not trust anyone." Woodall contends that the prosecution struck the juror solely because of her race in violation of

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In *Batson, supra*, the United States Supreme Court promulgated a three step process for determining whether peremptory challenges had been properly exercised. First, a defendant must establish a prima facie case of racial discrimination. Second, the prosecutor must provide a race neutral reason for the exercise of the peremptory challenge, and third, the trial court is to conduct an inquiry into the ultimate question of whether there was discriminatory intent in the exercise of the peremptory challenge. Our examination of the record in this case indicates that the justification for striking peremptorily the one remaining African American juror was not a pretext for racial discrimination. The Commonwealth can rely on a jury questionnaire to derive its race neutral reasons for striking a juror. *Commonwealth v. Snodgrass*, Ky., 831 S.W.2d 176 (1992). An attitude of mistrust expressed on a juror questionnaire should be given the same weight as an attitude of mistrust or bias expressed by a juror on voir dire examination. *Batson* was not intended to remove all prosecutorial discretion as to the use of peremptory challenges but only to eliminate the obviously bad practice of eliminating potential jurors because of their race only. The evaluation of whether the offered reasons for a prosecutorial challenge remains in the sound discretion of the trial judge. *See U.S. v. McMillon*, 14 F.3d 948 (4th Cir. 1994), which stated in part that the trial court, present on the scene, found the reasons articulated were both nondiscriminatory and actual.

Under all the circumstances, the trial judge did not abuse his discretion by rejecting the *Batson* challenge.

VI. Presentence Sexual Offender Treatment Program Evaluation

Woodall argues that the use by the trial judge of statements made by him during a sex offender treatment evaluation, which the trial judge ordered after he pled guilty but before his penalty trial and sentencing, to sentence him to death and to the terms of imprisonment violated Kentucky law and the federal and state constitutions. He claims that the trial judge used the statements to sentence him to death and a term of years imprisonment which was a violation of his right against self-incrimination. We disagree.

Woodall made no incriminating statements about the crimes for which he had already pled guilty. He denied remembering the circumstances surrounding the crimes. None of his rights were violated.

Approximately one week after Woodall pled guilty, the trial judge ordered an evaluation be conducted pursuant to KRS 532.050(4) by the sex offender treatment program. Defense counsel objected to the evaluation and the trial judge stated that he would not release the report to the defense nor the prosecution until after the penalty trial had been completed. The report stated that Woodall was extremely guarded in answering all questions and most responses were extraordinarily brief in nature. The evaluator observed that the interview was abbreviated and further limited

by the defendant's professed inability to recall any specific events surrounding the offense.

The trial judge properly ordered the report pursuant to KRS 532.050(4) which provides in part that if a defendant has been convicted of rape, the court shall, prior to determining the sentence, order an evaluation to be conducted by the sex offender treatment program. Subsection 1 of the statute does not preclude the trial judge from ordering a presentence investigation report simply because this is a capital case. The statute does not require a presentence investigation report, but neither does it preclude such a report. The presentence investigation report is different from the sexual offender evaluation in subsection 4 of the statute.

The report was not used during the penalty phase and was not given to either counsel until the time of sentencing when the trial judge approved the sentence as fixed by the jury. Pursuant to KRS 532.025 and 532.050, it is the duty of the trial judge to impose an appropriate sentence for the individual once guilt has been determined. Here, Woodall pled guilty and so there is no authority to prevent the trial judge from ordering the sex offender evaluation and the presentence report. Before pronouncing sentence, the trial judge gave the defendant the opportunity to make any amendments, alterations or changes to any of the reports. Woodall did submit some letters on his behalf but did not make a request for amendments, corrections or make objections. There is no evidence that the trial judge considered any statement made by Woodall during the evaluation in reaching the sentence

ultimately imposed. The rights of the accused were not violated because he made no incriminating statements during the evaluation.

Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) is not applicable because it is factually different. In *Mitchell, supra*, the defendant did not deny committing crimes but only admitted some of the offenses she was charged with. Here the silence of Woodall did not cause the judge to assume that he had committed other crimes. He had already admitted committing the offenses when he pled guilty.

Woodall never expressed any remorse during the trial and the trial judge considered the lack of expression of remorse when he followed the penalty fixed by the jury, however, there is no evidence the trial judge assumed lack of remorse from the evaluation report. We find relying on the principles in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) unpersuasive. In *Estelle, supra*, the Supreme Court held that the prosecution's use of psychiatric testimony at the sentencing phase of the defendant's capital murder trial to establish his future dangerousness violated his constitutional rights. Here, there is simply no evidence that the trial judge used the statements of Woodall during the evaluation to establish lack of remorse or the appropriateness of the penalties fixed by the jury.

VII. Questioning of Jurors During Voir Dire

Woodall argues that the trial judge erred when he questioned three jurors about pretrial publicity in open court in front of the entire jury panel, and excused three of them for cause. Defense counsel requested that further questioning be held out of the hearing of the other jurors, but the trial judge refused.

Woodall claims that he has a right, pursuant to RCr 9.38 to individually voir dire each of the excused jurors about the range of penalties in a death penalty case and about pretrial publicity. Woodall also contends that the questioning of these jurors tainted the entire jury panel because it educated jurors who wanted to remain on the panel about what they needed to say to avoid being removed for cause.

The landmark case regarding the questioning of the jury panel about pretrial publicity was *Morris v. Commonwealth*, Ky., 766 S.W.2d 58 (1989). In that case, the trial judge failed to conduct any individual voir dire on the matter of pretrial publicity, choosing instead to question the entire panel. *Morris supra*, highlights the danger of questioning jurors in front of the entire panel about pretrial publicity is that one member of the panel might slip a piece of information that taints the entire group. Consequently, *Morris* specifically condemns asking specific questions about what information a jury panel member may have gathered outside the courtroom.

During the trial judge's general voir dire, the initial panel of 74 prospective jurors was asked if any had "either read about this case in the newspaper, seen something on T.V., or heard something about it on the radio, or otherwise have had some kind of prior exposure to this case?" A number of prospective jurors raised their hands. The judge then asked:

> Due to what you have read, seen, or heard about this case, would any of you who have raised your hand that would be unable to consider -- to consider the entire range of penalties given to you by the Court and warranted by the evidence? Is there any of you who -- quite a few of you who have read, heard, or seen, maybe even heard talk about this case – will be unable due to seeing, hearing, or reading about it to consider the entire range of penalties, and I'm telling you that there will be a range of penalties given to you by the Court and warranted by the evidence? Anybody unable to do that of this 74?

Defense counsel then stated, "I would ask the Court to have the discussion with the juror at the bench outside the hearing of the other jurors." The trial court responded, "Okay. Well let me finish first." Despite not having been advised of the range of penalties, three prospective jurors raised their hands. The trial judge continued:

> Dorothy Call. Okay. Anyone else who will be unable to consider the entire penalty range if you were selected as a juror in this case? Mr. Wells, and Mr. Flick, and Ms. Call, are you telling the Court that you would be unable because of pretrial publicity or whatever to consider the full range of penalties? Is that what you all are telling the Court?

When all three jurors responded in the affirmative, the trial judge excused the three without eliciting from them what information each had obtained that would prevent him/her from considering the full range of penalties.

RCr 9.38 provides in part:

> When the Commonwealth seeks the death penalty, individual voir dire out of the presence of other prospective jurors is required if questions regarding capital punishment, race or pretrial publicity are propounded. Further, upon request, the Court shall permit the attorney for the defendant and the Commonwealth to conduct the examination on these issues.

Woodall does not argue that his counsel requested permission to question these jurors with respect to either pretrial publicity or capital punishment, but only claims that any question in open court that relates

to pretrial publicity violates the rule. As we explained in *Morris*:

> The reason for the change in the rule and the reason for this ruling are the same. When there has been extensive pre-trial publicity, great care must be exercised on voir dire examination to ascertain just what information a prospective juror has accumulated. In the absence of individual voir dire, a disqualifying item of knowledge or a rumor voiced by one panelist -- even inadvertently -- may well taint the entire panel.

Id. at 59-60; *see also Tamme v. Commonwealth*, Ky., 973 S.W.2d 13, 24 (1998) *cert. denied*, 525 U.S. 1153 (1999); *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871, 874 (1993). Although we regard what occurred here as at least a technical violation of RCr 9.38 and potentially dangerous, the error in this instance was harmless as no information was stated in open court that could have tainted the other members of the panel.

Woodall, however, asserts that even though the three excused jurors imparted no prejudicial information about the case to the other members of the panel, any remaining potential jurors who *wanted* to serve on the case would now know what *not* to say to avoid being excused for cause. We think the converse to be more likely, *i.e.*, that jurors who did not want to sit

on a lengthy and difficult case would know what to say in order to be excused for cause. Regardless, neither scenario is within the contemplation of RCr 9.38; and both are as meritless as would be an assertion that jurors would give dishonest answers to other voir dire questions for the purpose of being or not being excused from the panel. There is no proof that any prospective jurors actually gave false answers under oath to voir dire questions for the purpose of ensuring their acceptance or rejection as jurors on this case; and we will not predicate reversible error on the assumption that they knew how to do so had they been so inclined.

We will now consider those arguments raised in the briefs, but not orally argued. This Court has fully considered all the arguments presented by Woodall.

VIII. Prosecutor's Closing Argument

Woodall maintains that there were numerous improper and prejudicial comments by the prosecutor during closing arguments, all of which resulted in denying due process and a reliable determination of his sentences.

Woodall claims that

A) The prosecutor appealed to the jurors' sense of responsibility to the community.

B) That the prosecutor expressed his personal opinion that death was the only true punishment and

that for the sake of justice, the returning of such a penalty was the right thing to do.

C) The prosecutor improperly contrasted the pure goodness of the victim and sympathy for her family against the evil of the defendant.

D) The prosecutor improperly commented on the silence of the defendant at trial and denigrated the defense for allowing him not to testify.

E) The prosecutor misstated evidence and asked the jury to speculate about matters not in evidence.

F) The prosecutor misstated the law and nullified the instructions of the court concerning mitigating circumstances.

The prosecutor did not improperly appeal to the jury's sense of responsibility to the community. A prosecutor may call on a jury to do its duty. *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1988).

It should be noted that there were objections to portions of the closing statement by the prosecutor, but no objection was made to the errors alleged under this issue. It was not improper for the prosecutor to give his interpretation of the evidence and his recommendation as to the punishment. *See Hamilton v. Commonwealth*, Ky., 401 S.W.2d 80 (1966). The prosecutor's argument was merely to give his recommendation based on the facts presented as well as the guilty plea, including the aggravating circumstances. The comments of the

prosecutor were not inappropriate. The statements made by the prosecutor about both victim and defendant are not the basis for error. All of the comments made by the prosecutor were supported by the evidence. Of course, the defense had the opportunity for final closing arguments and response as thought to be necessary.

The Commonwealth may portray the reality of the violence, giving some background and information regarding the victim in order to give a full understanding of the nature of the crime. *Bowling*. In a concurring opinion, it has been stated that a prosecutor can provide the fact finder with a quick glimpse of the life the criminal chose to end so as to remind the jury that the victim was a unique human being. *Payne v. Tennessee*, 501 U.S. 808, 111 SCt. 2597, 115 L.Ed.2d 720 (1991). We agree. We have found no error in bringing to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community. *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519 (1984). The references to the victim and her family did not in any way deprive Woodall of a fair and impartial trial. Victim impact evidence is another method of informing the sentencing authority about the specific harm caused by the crime. *Payne, supra*.

There was no improper reference to the lack of remorse or silence by the accused. We find nothing in the remarks of the prosecutor that refers to the lack of remorse or silence, but only in emphasis on the fact that Woodall pled guilty after he realized the amount

of evidence the state had against him. The remarks used in this case are only a comment on defense strategy by the prosecutor. *Slaughter, supra.* The prosecutor was entitled to make a comment on the demeanor of Woodall in the courtroom. There was no objection to this comment and no prejudice resulted. It did not refer to a lack of remorse or silence or failure to testify. The prosecutor did not urge the jury to consider the plea as an aggravator.

The comments by the prosecutor were reasonable inferences drawn from the evidence. The prosecutor did not misstate evidence or ask the jury to speculate about matters not in evidence. Clearly, the prosecutor can give his opinion of the evidence. *Cf. Tamme v. Commonwealth,* Ky., 973 S.W.2d 13 (1998). In addition, the evidence supports the inference that the clothing of the victim had been forcefully removed. The prosecutor did not improperly comment on the fact that a defense witness testified on direct examination that during the course of three years, Woodall sexually abused both of her daughters, and that he had gone to prison for sexually abusing another girl and not her two daughters. The prosecutor merely made a reasonable inference that it was unknown how many counts of sexual abuse were outstanding based on the evidence.

The mere phrase used by the prosecutor, "When does it end?" does not imply that Woodall would continue to be dangerous so as to invoke the condemnation expressed in *Ice v. Commonwealth,* Ky., 667 S.W.2d 671 (1984). This Court has recently approved the

consideration by the jury of future dangerousness in *Hodge v. Commonwealth, supra,* quoting *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct 2107, 129 L.Ed.2d 133 (1994).

Finally, the prosecutor did not misstate the law or nullify the jury instructions regarding mitigating circumstances. The prosecutor is entitled to argue that mitigating evidence is entitled to very little weight. *See Tamme.* Defense counsel argued extensively to the jury about all the mitigating factors. Woodall has shown no actual prejudice. Many of the allegations presented under this assignment of error suggest that the decision at trial not to object was only trial strategy.

IX. Instructions on Mitigators

The trial judge did not err in giving an instruction on mitigating circumstances to the jury where that instruction did not require that mitigating circumstances be found unanimously or beyond a reasonable doubt.

Woodall claims that the trial court submitted an instruction that required the jury to find mitigating circumstances unanimously and beyond a reasonable doubt. He contends that the jury instructions, when read as a whole and given their common sense meaning, lead to a conclusion that the entire jury had to be unanimous. We find such argument unconvincing. This Court has repeatedly indicated that an instruction on unanimous findings on mitigation is not required.

Bowling. This situation does not violate the doctrine set out in *Mills v. Marvland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) because there was no requirement the jurors unanimously reach a conclusion regarding any mitigating factor. Each individual juror was free to examine and react to any mitigating factor when determining the appropriate sentence. Any juror who found a mitigating factor could use that fact to prevent the unanimous sentence of death.

X. Denial of Funding

The trial judge did not abuse his discretion by denying the motion for funding to conduct a PET scan and other psychological testing. Woodall argues that there was a reasonable necessity for the tests and that he was deprived of due process as a result of the denial.

At a hearing on his motion, Woodall sought funding for the brain imaging procedure known as "Positron Emissions Tomography" or PET. He alleged that he suffered from various brain disorders and the PET scan would allow an evaluation to be made about certain portions of the brain that may not be functioning appropriately. Dr. Eric Drogin, a psychologist and attorney employed by the defense, testified at the hearing conducted by the trial court. He stated that he had met Woodall twice, once for 5-1/2 hours and another time for 45 minutes. He did not issue a written report on either occasion and he did not do a separate psychological history of Woodall but rather relied on the history provided by the Kentucky Correctional

Psychiatric Center (KCPC) as prepared by Dr. Richard Johnson.

The report prepared by KCPC indicated that Woodall had been observed as an inpatient around the clock and a series of clinical and forensic interviews had been conducted by Dr. Johnson. Dr. Johnson testified for Woodall at the penalty phase of the trial and his report was introduced as mitigating evidence.

The Kentucky standard for review of this claim is whether there was a reasonable necessity for funding to conduct additional neuropsychological testing. *Sommers v. Commonwealth*, Ky., 843 S.W.2d 879 (1992). The trial judge correctly determined that the testimony of defense witness Dr. Drogin was unpersuasive because the psychologist had not spent much time with defendant, had not kept records and had not issued a written report. In addition, he had not done a psychological history of the defendant. The KCPC report specifically eliminated the possibility of organic brain damage. We find no error in the decision of the trial judge in declining to grant a continuance or to allow funding for additional testing. *See Simmons v. Commonwealth*, Ky., 746 S.W.2d 393 (1988), in a case which determined whether the defendant in that matter was competent to stand trial.

We are not persuaded by the reliance on *Binion v. Commonwealth*, Ky., 891 S.W.2d 383 (1995) because it is factually distinguishable. In that case the KCPC report mentioned the possibility of an organic brain defect and there was a strong factual basis for his claim that additional testing was reasonably necessary.

XI. Mental Health Evaluation by KCPC

Woodall contends that the trial judge was not authorized by KRS 504.070, RCr 7.24 or by the decision of the prosecutor to seek death, to order that an evaluation be conducted by KCPC with regard to the mitigating evidence of I.Q. and psychological evaluation as sought by the prosecutor. Ultimately, the evaluation was introduced during the penalty phase of the trial by Woodall.

Woodall admits that he gave notice of possible mental health evidence and indicates that the examination was ordered over his objection. He contends that the KRS 504.070 authorizes an examination on behalf of the Commonwealth only if he gave notice of intent to introduce evidence of mental illness or insanity and that he only gave notice that he might introduce evidence of mental retardation. He claims that he was only offering the evidence as mitigation and not as evidence relating to guilt.

We are not persuaded by the attempt by Woodall to in effect hedge his notice and phrase it in such a way that he can later argue that it was not really notice. Nothing in KRS 504.070 states that the mental health evidence offered by the defendant must relate to the question of guilt rather than mitigation. The statute is silent about the evidence having to be a defense. The entire purpose of introducing the evidence was to mitigate punishment. RCr 7.24(3)(B) permits the court to order the defendant to submit to a mental

examination at the request of the Commonwealth and upon notice from the defendant that he intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of guilt. Here the mental retardation claim went to the level of culpability and the judge correctly ordered an examination on the motion of the Commonwealth. In any event, Woodall waived any claim that the evaluation violated his Fifth Amendment right against self-incrimination when he introduced the evaluation into evidence on his own behalf. Cf. *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987); and *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1851, 146 L.Ed.2d 826 (2000) which state that a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted. We find no error in the decision of the trial judge to order the KCPC evaluation.

XII. Alleged Hearsay

Woodall argues that the trial judge erred in admitting a statement made by Dr. Johnson who was testifying as a defense psychologist regarding Woodall's failure to complete successfully a sex offender treatment program while in prison. The psychologist stated that the defendant had applied for and was admitted to a sex offender treatment program but was terminated due to excessive, unexcused absences. Woodall claims that the statement was inadmissible hearsay pursuant to KRE 802 and not covered by any hearsay exception. He claims that the admission of this

evidence created in effect another aggravating circumstance of which Woodall was not properly notified.

The complained of remark was made in response to cross-examination by the prosecution about the prison records that Dr. Johnson had the opportunity to review. It is conceded by all that this question is unpreserved. The Commonwealth argues that any error arising from the admission of one offhand, marginally relevant reference to the failure to complete a sex offender program is harmless error.

The statement by Dr. Johnson was admissible under KRE 703 because it tended to show the basis of his opinion which was that Woodall was suffering from a variety of psychological ailments. The evidence is clear that Dr. Johnson relied on Woodall's psychological history when reaching his conclusions. He stated that a psychiatric social worker had prepared background and personal history on Woodall. The doctor stated that he had examined hospital, school and prison records during his evaluation of the defendant. In his final report, the doctor specifically cited the failure to complete the sex offender program. The past history of the defendant, including his time in prison and the failure to complete the program had some role in the diagnosis. As noted by Dr. Drogin, a psychologist called by the defense, it is important to have as much of an understanding as possible of the background of a patient or defendant for the purposes of a forensic psychological evaluation. Thus, the testimony was properly admitted pursuant to KRE 703(a).

The trial judge did not err by not making a determination under KRE 703(b) that the information was trustworthy, necessary to illuminate testimony and unprivileged. Woodall made no objection to the information when it was offered and, consequently, the trial judge had no notice of any necessity to conduct an inquiry pursuant to KRE 703(b). The defendant did not request an admonishment pursuant to KRE 703(b) and thus was not entitled to one. No evidence was offered to demonstrate how Woodall was prejudiced by the comment of Dr. Johnson.

The statement by the psychologist did not amount to evidence of an aggravating circumstance. Dr. Johnson was presented as a defense witness with the intention of presenting mitigating psychological evidence. The questioning on cross-examination by the prosecution regarding the basis of his opinion was proper and was not an attempt to present an "unwritten" aggravating circumstance. It was not error to permit the jury to hear the statement by Dr. Johnson.

XIII. Denial of Continuance

Woodall maintains that the trial judge abused his discretion by denying a motion for a continuance on June 12, 1998. He claims that the denial impaired his ability to present a mental health defense and otherwise denied him due process. Woodall was indicted on March 18, 1997 and his trial was set for October 28 of the same year. He sought and was granted a number of relatively routine pretrial continuances, examinations and even a change of

venue. The defense received a continuance from February 23, 1998 until April 13 because of the unsatisfactory health of the lead counsel. On April 10, 1998, three days before the scheduled trial, Woodall entered his guilty plea and sought to continue the penalty phase because he needed the time to assess a mental health defense. The motion for continuance was denied and the night before the penalty phase was to begin, lead counsel was again stricken by illness. An experienced local attorney who had handled several capital cases in the past was appointed to the defense team. On June 12, 1998, she filed a motion for continuance claiming that she could not be prepared because of the complexity of the case. The motion was denied. The trial judge did not abuse his discretion by refusing the motion for continuance.

This Court has stated on several occasions that a trial judge has broad discretion in either granting or denying a continuance. The reviewing court should not reverse a criminal conviction unless the trial judge has abused his discretion in the denial of a continuance. *See Abbott v. Commonwealth*. Ky., 833 S.W.2d 417 (1992) and *Dishman v. Commonwealth*, Ky., 906 S.W.2d 335 (1995) *citing Pelfrey v. Commonwealth*, Ky., 842 S.W.2d 524 (1993).

Woodall claims that his case should be analyzed according to the factors set out in *Snodgrass v. Commonwealth*, Ky., 814 S.W.2d 579 (1991). We have conducted such an analysis and find that the *Snodgrass* factors all favor the denial of an additional continuance. As observed in *Snodgrass*, a continuance

is appropriate in a particular case depending on the unique facts and circumstances of that case.

> Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

New counsel for Woodall did not specify the length of the delay in the continuance motion but simply lamented the fact that she had 40 to 50 people to interview and that it obviously would take a very long time. The trial judge had previously noted that the penalty phase was taking place almost 14 months after the crimes had occurred.

Previous continuances had resulted in a delay of almost nine months from the original trial date to the eventual penalty phase. The claim of medical necessity by the defense is without merit because there were other experienced attorneys who could have been assigned to the case when lead counsel became ill. There was definite inconvenience to the Commonwealth as a litigant because a number of witnesses it planned to call would have been greatly inconvenienced if the trial had been delayed yet again. The trial judge made particular reference to this fact in

his denial of the March 30 continuance sought by the defendant. The trial judge indicated that he had a heavy schedule throughout August and September and could not delay the case without serious inconvenience to other litigants on his docket.

The fourth *Snodgrass* factor is whether the delay is purposeful or caused by the accused. Here the record indicates that Woodall challenged the request of the prosecution for a mental health evaluation from the outset of the attempts to evaluate him by seeking a writ of prohibition with the Court of Appeals and ultimately with this Court alleging irreversible injury if he was examined. On January 26, 1998, less than a month before the second scheduled trial date, he changed his position and then argued for continuance after continuance so he could have more time to prepare a mental health defense. In addition, substitute lead counsel was assigned the case on April 24, 1998 and indicated to the trial judge that she would be prepared by July 14, 1998, even though she realized that this was a death penalty case. We would also note that there was other competent and experienced counsel who was available for the entire year, except for July, and yet no one on the defense team contacted him regarding availability. Eventually the trial judge made the inquiry. Considering the delay factor and the availability of counsel, we cannot find any error in the trial courts ultimate decision.

The complexity of the case does not convince us that there was not sufficient time to prepare. The delay had been at least nine months and the only question was

punishment as distinguished from guilt. Finally, there was no identifiable prejudice to Woodall because his counsel had adequate time to investigate his mental condition and to prepare a sufficient defense.

Consequently, as a result of an analysis of the *Snodgrass* factors, we find that the trial judge did not abuse his discretion in denying the final motion for continuance.

XIV. Serologist Testimony

Woodall claims that the testimony of a serologist employed by the KSP forensic department, called by the prosecution to testify about blood-spatter evidence was improperly admitted because the testimony was based on speculation and assumption. He also argues that the reenactment of the crime by the serologist was inaccurate and speculative.

The witness testified about photographs taken of the interior of the victim's van and over objection he testified that one stain was made by the face of the victim being mashed into the seat. The qualifications of the witness to discuss blood stain pattern had been stipulated, but there was objection that he was not a crime-scene reconstructionist who could give an opinion about the actual events that may have transpired during the crime.

The testimony of the serologist was supported by physical evidence and he referred to the location of the blood stains and explained his reasoning to the jury.

The testimony was not based on assumption but was unbiased and objective.

Our review of the record does not indicate that there was any demonstration involved in the testimony of the witness. There was certainly no specific objection to any demonstration that is alleged. The description of the position of the victim when she left blood stains on the seat, conforms to the "substantial similarity" test provided in *United States v. Wanoskia,* 800 F.2d 235 (10th Cir. 1986). There was no abuse of discretion on the part of the trial judge and the argument is without merit.

XV. Crime Scene Photographs

The crime scene photographs that were seen by the jury were not gruesome, repetitive or inherently inflammatory. They were properly admitted into evidence. Woodall objected to seven photographs of the interior of the van of the victim, two photographs of her body and two photographs of her clothing. Here, the photographic evidence proved the identity of the victim and the cause and manner of death. Even in circumstances where there is a guilty plea, the Commonwealth still has the burden of proving that aggravating circumstances exist and that there is a basis for the death penalty. It may introduce any relative and probative evidence necessary. *See Brown v. Commonwealth,* Ky., 934 S.W.2d 242 (1996). Relevant photographs are not inadmissible simply because they are gruesome and the crime is heinous. *See Clark v. Commonwealth,* Ky., 833 S.W.2d 793

(1991), citing *Brown v. Commonwealth*, Ky., 558 S.W.2d 599 (1977). The trial judge has broad discretion in such matters. *Sherley v. Commonwealth*, Ky., 889 S.W.2d 794 (1994). The trial judge did not abuse his discretion in admitting such evidence.

XVI. Number of Peremptory Challenges

Woodall argues that because each side received ten peremptory challenges, he was entitled to have one more than the prosecution relying on *Springer v. Commonwealth*, Ky., 998 S.W.2d 439 (1999).

Springer supra, involves a situation where the defendants did not get the proper number of peremptory challenges. There is no constitutional right to peremptory challenges. *See McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996), citing *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988).

Here there was no objection to each side getting ten strikes. Peremptory challenge claims are waived once the jury is sworn at trial. RCr 9.36(3); *United States v. Broadus*, 7 F.3d 460 (6th Cir. 1993). The trial judge equalized the number of challenges but did not reduce those available to Woodall. He received what he was entitled to under the rules. RCr 9.40. *Springer* only applies when there is more than one defendant and, therefore, has no application here. The citations by Woodall to civil cases are unpersuasive.

XVII. Recall of Character Witness

The clerk at the mini-mart who was working on the night of the crime was originally called as a witness for the prosecution. Later in the trial the prosecution obtained permission to recall the clerk as a witness in order to introduce a statement that allegedly was made by Woodall when the two of them noticed a female acquaintance in the store. The witness said that Woodall said "Man, I'd like to have a piece of that." The prosecution stated that the remark was admissible to show the state of mind of Woodall.

Woodall argues that the statement was inadmissible pursuant to KRE 404(a) because it is character evidence which would reflect negatively on his character. Woodall contends that the testimony was evidence of future dangerousness, an aggravating circumstance that Woodall was not properly notified of.

We view this statement as an admission by Woodall to show intent and motive and is therefore admissible. The claim of future dangerousness as a statutory aggravator is not applicable.

XVIII. Prior Statement of Witness

Prior consistent statements of the witness to a police officer about the mini-mart comment of Woodall were properly admitted. Although he disagrees, defense counsel challenged the trial testimony as being a recent fabrication. Defense counsel did attack the testimony of the witness as a recent fabrication and the

introduction of the prior consistent statement was necessary to show that the statement was not fabricated.

KRE 801A(a)(2) provides that a prior consistent statement is admissible to rebut an expressed or implied charge against the declarant of recent fabrication or improper influence or motive. Counsel for Woodall first asked the witness if he had just forgot the statement, implying that it was not necessarily trustworthy or important. She also noted that the witness had spoken with the Commonwealth Attorney before he gave his testimony. All of this raises an inference that Woodall was attempting to imply that the testimony was not true.

The trial judge was not in error when he allowed the questions to be asked. The trial judge has the responsibility of determining the demeanor of the witness as well as that of counsel and included in that are the tone of voice and body language when the questions are propounded. We find no error in this situation.

XIX. Guilty Plea

Woodall claims that his guilty plea was invalid because it was not a knowing, voluntary and intelligent waiver of his constitutional rights. He states that the plea was not entered voluntarily because of his low intelligence and the impairment of counsel and that he did not understand that he would be waiving his Fifth Amendment privilege by pleading guilty and finally

that the trial judge did not adequately establish the factual basis for the plea. He concedes that this issue is unpreserved.

Woodall specifically answered the questions of the court regarding the voluntariness of the plea in the affirmative on three different occasions. It is clear that Woodall understood all the consequences of his plea. Counsel made it clear that he had discussed the case with the defendant and he stated that he believed the plea to be voluntary. As stated in *Kotas v, Commonwealth*, Ky., 565 S.W.2d 445 (1978) citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) the validity of a guilty plea is determined not by reference to some magic words but from the totality of the circumstances surrounding it. Here, there was the necessary affirmative showing in the record that the plea was intelligently and voluntarily made as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and noted in *Sparks v. Commonwealth*, Ky.App., 721 S.W.2d 726 (1986).

There is no convincing evidence that defense counsel was impaired when he advised Woodall to plead guilty. There is a letter from counsel's physician stating that the lawyer was physically and emotionally exhausted but that was almost two months before the plea was entered. There was no indication that counsel was impaired during the plea colloquy, nor was health ever raised as an issue during the proceedings. The plea was properly accepted by the trial judge.

The claim by Woodall that he was not informed of the effect of the guilty plea is without merit. The defendant was fully informed of his rights by the trial judge. There is nothing in the record to indicate that he did not have a full and complete understanding of his rights and that he voluntarily chose to plead guilty.

The record indicates that the trial judge carefully explained the factual basis for each charge against Woodall who then admitted his guilt as to all charges. The procedure followed the requirements of *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).

XX. Double Jeopardy Claim

Woodall maintains that the use of his rape conviction to enhance the murder conviction to a death eligible offense is a violation of double jeopardy principles because neither offense required proof of an element that the other did not. He asserts that the use of the death to establish the physical injury requirement of first-degree rape and the use of the death again as an element in the murder conviction amounts to double enhancement.

Simply because the aggravating circumstance duplicates one of the underlying offenses does not mean that the defendant is being punished twice for the same offense. The underlying offenses were only factors to be considered as to whether the punishment for murder should be death. Woodall was not subjected to double jeopardy or multiple punishment for the same

offense. *See, Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990); *Bowling v. Commonwealth*, Ky., 942 S.W.2d 293 (1997); *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148 (1995); *Wilson v. Commonwealth*, Ky., 836 S.W.2d 872 (1992).

XXI. Aggravating Enhancing Factors

The trial judge properly relied on nonstatutory aggravating factors to enhance the sentence. Woodall claims that such use is unconstitutional. Similar arguments have been rejected by this Court in *Matthews v. Commonwealth*, Ky., 709 S.W.2d 414 (1986); *Mills v. Commonwealth*, Ky., 996 S.W.2d 473 (1999) and *Tamme v. Commonwealth*, Ky., 973 S.W.2d 13 (1998). The use of nonstatutory aggravating circumstances is permissible as long as the jury makes the required finding that at least one statutory aggravating circumstance exists. We find no error in this respect.

XXII. Proportionality

Woodall contends that the death penalty is a disproportionate punishment as applied in this case. Specifically, he claims that this Court should conduct a proportionality review and rule that his sentence is disproportionate because other criminal defendants who have committed similar crimes under similar circumstances were able to avoid the death penalty.

The United States Supreme Court has rejected the idea that this specific form of proportionality review is

constitutionally required. *See Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). The Sixth Circuit has also rejected the argument in *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996).

However, this Court, pursuant to KRS 532.075 has reviewed the death sentence imposed in this case and concludes that it was not fixed under the influence of passion, prejudice or any other arbitrary factor. The evidence supports the finding of an aggravating circumstance. We have considered whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, as required by statute and have considered all circumstances of the crime committed here, and all of the evidence surrounding the defendant and his background. The information used in considering this penalty has been compiled in accordance with KRS 532.075(6)(a)(b) and (c). We have considered all the cases in which the death penalty was imposed since 1970 involving both the crime and the defendant. On the basis of this review, we have determined that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases considering both the crimes and the defendant.

XXIII. Statutory Guidance for Death Penalty

Woodall contends that the death penalty procedures do not provide directions to the judge and the fact finder on how the fact finder shall hear additional evidence in extension, mitigation and aggravation of punishment. This Court has previously rejected similar

arguments in *Hodge, supra; Bowling, supra*; *Foley v. Commonwealth*, Ky., 942 S.W.2d 876 (1996); *Haight v. Commonwealth*, Ky., 938 S.W.2d 243 (1996). *See also Tuilaepa, supra;*. *McQueen v. Scroggy, supra.* KRS 532.025 is constitutional

XXIV. Death Penalty Not Arbitrary

Woodall claims that the death penalty in Kentucky is unconstitutionally arbitrary and insidiously discriminatory. This Court has previously rejected similar arguments as stated above.

XXV. Proportionality Review Constitutional

Woodall argues that the method of proportionality review conducted by this Court violates his due process rights because it defines similar cases as only those in which the death penalty was imposed. This argument has been repeatedly rejected by this Court. KRS 532.075 is constitutional.

Woodall also claims that he needs data required by KRS 532.075(6), regarding the application of capital punishment in Kentucky. Similar arguments have been previously rejected. *See Ex parte Farley*, Ky., 570 S.W.2d 617 (1978); *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980).

XXVI. Penalty Phase Verdict Form

The verdict form used in this case and a number of other cases does not constitute reversible error. Similar

arguments have been rejected in *Hodge, Foley, supra; Haight, supra,* and *Wilson v. Commonwealth*, Ky., 836 S.W.2d 872 (1992). Federal courts have also refused to grant relief. *See James v. Whitley*, 926 F.2d 1433, (5th Cir. 1991); *Flamer v. Delaware*, 68 F.3d 736 (3rd Cir.1995).

XXVII. Death Qualification of Jury

Woodall asserts that his due process rights were violated because the jurors who were unwilling to agree to consider a death sentence were excused for cause. Similar arguments have been rejected by this Court in *Wilson, supra.* The U.S. Supreme Court has also rejected this type of argument in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

XXVIII. Cumulative Error

There is no basis to claim cumulative error in this case. We have found no errorthat has existed in any of the other assignments of error by Woodall, and consequently we find no cumulative error. *Sanders v. Commonwealth*, 801 S.W.2d 665 (1991).

The judgment of conviction based on a guilty plea and the sentences of the circuit court are affirmed. Lambett, C.J., Cooper, Graves, Johnstone and Wintersheimer, JJ., concur. Stumbo, J., dissents by separate opinion in which Keller, J., joins in part.

COUNSEL FOR APPELLANT:

Thomas Ransdell
Assistant Public Advocate

Randall L. Wheeler
Assistant Public Advocate
Dept. of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Albert B. Chandler III
Attorney General

N. Susan Roncarti
Assistant Attorney General

Gilbert Busby
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601

RENDERED: August 23, 2001
TO BE PUBLISHED

Supreme Court of Kentucky

1998-SC-0755-MR

ROBERT KEITH WOODALL — APPELLANT

APPEAL FROM CALDWELL CIRCUIT COURT
V. HON. BILL CUNNINGHAM, JUDGE
97-CR-00053

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE STUMBO

Respectfully, I must dissent from the majority opinion. My primary disagreement with the majority stems from the ruling that there was no error in the failure of the trial court to instruct the jury that no adverse inference should be drawn from Appellant's decision not to testify during the penalty phase of the trial. The majority opinion states that this is not an error because Appellant entered a guilty plea to the charges and the evidence of guilt was overwhelming. Because he pled guilty, according to the majority, a no adverse inference instruction could have no effect on a determination of guilt and, thus, no negative inferences could be drawn by the jury from Appellant's silence.

The plain language of *Mitchell v. United States*, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), disputes the conclusion reached by the majority. Therein, the United States Supreme Court stated as follows:

> The rule against adverse inferences from a defendant's silence in criminal proceedings, including sentencing, is of proven utility. Some years ago the Court expressed concern that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." . . . [H]ere can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition. . . . The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the

> expense of the self-incrimination privilege.

Mitchell, 526 U.S. at 329, quoting *Ullmann v. United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956).

The majority would have us eradicate the important Constitutional right involved here by failing to require the trial court to give the requested instruction. The majority states that the instruction is not necessary because Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes. That may be so, but Appellant did contest the sought penalty of death during his penalty phase trial. He cross-examined the eleven witnesses presented by the Commonwealth and presented fourteen witnesses of his own who testified about Appellant's life and the effects his upbringing had on him. As noted in *Mitchell*, 526 U.S. at 327, "it appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of [his] guilt or innocence than with the severity of [his] punishment." For Appellant herein the stakes could not have been higher and his Fifth Amendment rights could not have been more important.

I also disagree with the trial judges' ruling that Appellant was not permitted to voir dire the jury about specific mitigating factors such as Appellant's mental retardation. While Appellant's IQ test results were not sufficiently low enough to render him ineligible for the death penalty, KRS 532.140, a defendant facing the

death penalty must not only be allowed to present evidence of his low IQ but the jury must be able to consider and give effect to it as mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 106, 102 SCt. 869, 71 L.Ed.2d 1 (1982); *Morgan v. Illinois*, 504 U.S. 719, 722, 112 S.Ct. 2222, 119 L.Ed.2d 4.92 (1992).

Finally, as to the *Batson* challenge, I would have remanded this case to the trial court for a hearing at which time the Court should conduct an inquiry into the ultimate question of whether there was discriminatory intent in the exercise of the peremptory challenge. None was held and there was no ruling by the trial court on the legitimacy of the prosecution's explanation because the trial court apparently, and erroneously, believed that because Appellant was white, he had no ground to object to the exclusion of the sole black juror remaining in the venire. "[A] criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." *Powers v. Ohio*, 499 U.S. 400,402, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Keller, J., joins this dissent as to the mitigation evidence voir dire and *Batson* issues, but finds the trial court's failure to give a no adverse inference instruction, if erroneous, harmless because the defendant not only pled guilty, but admitted to the aggravating circumstances

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT KEITH WOODALL,
Petitioner-Appellee/Cross-Appellant,

v. ORDER

THOMAS L. SIMPSON, WARDEN,
Respondent-Appellant/Cross-Appellee

BEFORE: MARTIN, COOK, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Cook would grant rehearing for reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT
s/Deborah Hunt
Deborah Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 09-5352/5406

ROBERT KEITH WOODALL,
Petitioner-Appellee/Cross-Appellant,

v.

THOMAS L. SIMPSON, Warden,
Respondent-Appellant/Cross-Appellee.

Before: MARTIN, COOK, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeals from the United States District Court for the Western District of Kentucky at Paducah.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED and the case is REMANDED with instructions to conditionally grant the writ unless the State of Kentucky elects to initiate resentencing proceedings within 180 days of the district court's order.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Leonard Green, Clerk

OPPOSITION BRIEF

No. 12-794

In The Supreme Court Of The United States

RANDY WHITE, Warden, *Petitioner,*

v.

ROBERT KEITH WOODALL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DENNIS J. BURKE, KBA #87278
Assistant Public Advocate
DEPARTMENT OF PUBLIC ADVOCACY
207 Parker Drive, Suite 1
LaGrange, Kentucky 40031
502/222-6682
Fax: 502/222-3177

LAURENCE E. KOMP, KBA #84430*
Attorney at Law
P.O. Box 1785
Manchester, MO 63011
636/207-7330
Fax: 636/207-7351

COUNSEL FOR RESPONDENT,
ROBERT KEITH WOODALL

*Counsel of Record

RECEIVED
MAR 12 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit correctly applied AEDPA principles from (and consistent with) *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Tyler v. Cain*, 533 U.S. 656 (2001), *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), and *Panetti v. Quarterman*, 551 U.S. 930 (2007) to a trial court's failure to provide a no-negative inference instruction at a capital sentencing hearing because it was "intellectually dishonest," "illogical" and "lacked common sense" for a defendant to "offer no testimony" and "no explanation" to the jury, and such application does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court in *Carter v. Kentucky*, 450 U.S. 288 (1981), *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999)?

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's application of *O'Neal v. McAninch*, 513 U.S. 432 (1995) does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTORY STATEMENT 1

STATEMENT OF THE CASE 6

ARGUMENTS AS TO WHY CERTIORARI SHOULD BE DENIED 11

I. THERE IS NO REASON FOR THIS COURT TO SECOND-GUESS ITS LONG-STANDING AND WELL-SETTLED AEDPA PRECEDENT THAT A STATE COURT CAN UNREASONABLY REFUSE TO APPLY A GENERAL CONSTITUTIONAL PRINCIPLE TO A PARTICULAR SET OF FACTS 11

A. The Majority Followed AEDPA 11

B. No Conflict Among The Circuits 13

C. This Case is Not About Remorse 15

D. Conclusion 18

II. THE SIXTH CIRCUIT SIMPLY APPLIED THIS COURT'S LONG-STANDING *O'NEAL V. MCANINCH*, 513 U.S. 432 (1995) 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) 12
Atkins v Virginia, 536 U.S. 304 (2002) 1, 20
Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000) 15
Brecht v. Abrahamson, 507 U.S. 619 (1993) 19
Brooks v. Dretke, 444 F.3d 328 (5th Cir. 2006) 15
California v. Roy, 519 U.S. 2 (1995) 21
Carey v. Musladin, 549 U.S. 70 (2006) 5, 12
Carter v. Kemna, 255 F.3d 589 (8th Cir. 2001) 15
Carter v. Kentucky, 450 U.S. 288 (1981) ..... passim
Counselman v. Hitchcock, 142 U.S. 547 (1892) 3
Edwards v. Roper, 688 F.3d 449 (8th Cir. 2012) 13
Estelle v. Smith, 451 U.S. 454 (1981) ..... passim
Gattis v. Snyder, 278 F.3d 222 (3rd Cir. 2002) 15
Gautt v. Lewis, 489 F.3d 993 (9th Cir. 2007) 15
Jones v. Polk, 401 F.3d 257 (4th Cir. 2005) 22
Kyles v. Whitley, 514 U.S. 419 (1995) 4, 5, 13, 18, 22
Lee v. Smeal, 447 Fed. Appx. 357 (3rd Cir. 2011) 22
Malloy v. Hogan, 378 U.S. 1 (1964) 3
Mitchell v. United States, 526 U.S. 314 (1999) ..... passim
O'Neal v. McAninch, 513 U.S. 432 (1995) 5, 19, 21, 22
Panetti v. Quarterman, 551 U.S. 930 (2007) 5, 12, 14, 19
Sears v. Upton, 130 S.Ct. 3259 (2010) 21
Sherrors v. Woodford, 425 Fed. Appx. 617 (9th Cir. 2011) 22
Tucker v. Varner, 83 Fed. Appx. 462 (3rd Cir. 2003) 22
Turner v. Hernandez, 357 Fed. Appx. 797 (9th Cir. 1995) 22
Tuttle v. Utah, 57 F.3d 879 (10th Cir. 1995) 22
Tyler v. Cain, 533 U.S. 656 (2001) 12
Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995) 22
Ullman v. United States, 350 U.S. 422 (1956) 8, 21
United States v. Caro, 597 F.3d 608 (4th Cir. 2010) 14
Wendling v. Commonwealth, 137 S.W. 205, (Ky. 1911) 17-18
Wiggins v. Smith, 539 U.S. 510 (2003) 11
Williams v. Taylor, 529 U.S. 362 (2000) 5, 10, 11, 13, 14, 19
Wood v. Ercole, 644 F.3d 83 (2nd Cir. 2011) 21
Woodall v. Commonwealth, 63 S.W.3d 104 (Ky. 2002) 8, 9
Woodall v. Simpson, 685 F.3d 574 (6th Cir. 2012) ..... passim
Woodall v. Simpson, 2012 U.S. App. LEXIS 23974 (6th Cir. 2012) 1

Rules And Statutes

Fifth Amendment ..... passim
Supreme Court Rule 10 13
Supreme Court Rule 10(a) 18, 22
Supreme Court Rule 10(c) 19
28 U.S.C. §2254(d)(1) 4, 19

No. 12-794

In The Supreme Court Of The United States

RANDY WHITE, Warden, *Petitioner,*

v.

ROBERT KEITH WOODALL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Robert Keith Woodall, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the United States Court of Appeals for the Sixth Circuit's opinion in this case. The Sixth Circuit's opinion is reported as *Woodall v. Simpson*, 685 F.3d 574 (6th Cir. 2012).[1] The Sixth Circuit declined to review the State's *en banc* request. *Woodall v. Simpson*, 2012 U.S. App. LEXIS 23974 (6th Cir. 2012), Apx. 313a.

INTRODUCTORY STATEMENT

Respondent had pled guilty. Thus, the main event for Respondent's jury was whether he should live or die. Respondent's life was the sole, critical contest before the jury. During that adversarial proceeding, the State presented eleven witnesses and Respondent presented fourteen.

---

[1] Due to it's ruling, the Sixth Circuit pretermitted the consideration of three other issues. Apx. 12a. One of those appellate issues relates to the denial of funds for expert assistance as it relates to Respondent's *Atkins v Virginia*, 536 U.S. 304 (2002) claims. In support thereof, Respondent attached support from Dr. Denis Keyes, who was cited by this Court in *Atkins* and a nationally renowned mental retardation expert, that additional testing was merited. R. 28-2, 30-2, JA 120-23, 118-19.

Further, the jury received numerous instructions regarding whether to consider aggravation, and how to consider aggravation and mitigation.

Respondent did not testify at the penalty phase, and requested a *Carter* instruction informing the jury that he had no obligation to testify and that no adverse inference could be drawn from his failure to do so. The state agreed, interposing **no objection** to the *Carter* instruction. TE 1589, JA 69. The trial court rebuffed Respondent stating that it would not be "intellectually honest" to give the instruction. *Id.* The trial judge wrongly found that Fifth Amendment principles **did not** apply at the penalty phase: "In the sentencing stage to me it defies logic, it defies common sense, it's not intellectually honest to tell this jury...that you go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that. I just don't think its logical, so that's why I'm not going to give it." TE 1591-92, JA 71-72 (*see* Attached).[2]

Indisputably, the Fifth Amendment extends to both phases of bi-furcated sentencing proceedings. *Carter v. Kentucky*, 450 U.S. 288 (1981), established that a defendant has the right to receive a no adverse inference if one is requested under the Fifth Amendment. In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court extended the Fifth Amendment to penalty proceedings in a capital case irrespective of a previous guilt finding, and did not differentiate a guilt finding via an adversarial process versus a plea. This Court then held in *Mitchell v. United States*, 526 U.S. 314 (1999), that the above protections applied when guilt was established by a plea.

Both *Carter* and *Estelle* approach the Fifth Amendment's right to remain silent as a broad proposition applicable throughout a criminal case. Similarly, *Mitchell*, 526 U.S. at 329,

---

[2] "TR" refers to the trial transcript, "TE" refers to the transcript of evidence, and "JA" refers to the Joint Appendix filed with the Sixth Circuit by the parties.

recognized how its holding was dictated by what came before.[3] The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *Counselman v. Hitchcock*, 142 U.S. 547 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent ... and to suffer no penalty ... for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

This clearly established federal authority from this Court presents a simple syllogism, which is based on long-standing principles of this Court's precedent:

A. When requested, a criminal defendant is entitled to an instruction respecting the right to remain silent at the guilt phase of trial (*Carter*);

B. The same right to remain silent also applies to the sentencing portion of a capital trial (*Estelle*);

C. Therefore when requested, a criminal defendant is entitled to an instruction respecting this right at sentencing.

The syllogism's completion was foregone after *Estelle*. Indeed, *Estelle* required application of the Fifth Amendment to capital habeas proceedings. *Estelle* did not distinguish between guilt derived from a trial versus a plea. However, as if there was any doubt, *Mitchell* applied the right to a sentencing held after a guilty plea.

These principles were unquestionably violated in Respondent's case. Over a vigorous dissent, the Kentucky Supreme Court upheld the trial judge, concluding the Fifth Amendment offered no protection to Woodall at the penalty phase.

---

[3] "Our holding today is a product of existing precedent, not only *Griffin* but also by *Estelle v. Smith*, in which the Court could 'discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.' 451 U.S., at 462-463 []. Although *Estelle* was a capital case, its reasoning applies with full force here, where the Government seeks to use petitioner's silence to infer commission of disputed criminal acts. *See supra*, at 1314. To say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*. We are unwilling to truncate our precedents in this way." *Mitchell*, 526 U.S. at 329.

The district court found the Kentucky Supreme Court's categorical exclusion of the Fifth Amendment at a capital sentencing hearing unreasonable. The majority opinion (Judges Martin and Griffin) of the Sixth Circuit correctly affirmed, finding that:

> The Kentucky Supreme Court's denial of this constitutional claim was an unreasonable application of *Carter, Estelle*, and *Mitchell*. *See Williams*, 529 U.S. at 407 ("[A] state-court decision [is] an unreasonable application of [the Supreme] Court's precedent if the state court ... unreasonably refuses to extend [a legal] principle to a new context where it should apply."); *Mason v. Mitchell*, 543 F.3d 766, 772 (6th Cir. 2008) ("Clearly established law ... encompasses more than just bright-line rules laid down by the Supreme Court. It also clearly includes legal principles and standards enunciated in the Court's decisions." (alterations and internal quotation marks omitted)). The district court held that a capital defendant has a *Fifth Amendment* right to a "no adverse inference" instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement. We agree. "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Estelle*, 451 U.S. at 463. At stake in the penalty phase of a capital trial such as Woodall's is not only what specific punishment the defendant will receive, but whether he will be put to death. The *due process clause* requires that a trial court, if requested by the defendant, instruct the jury during the penalty phase of a capital trial that no adverse inference may be drawn from a defendant's decision not to testify.

Woodall, 685 F.3d at 579, Apx. 8a-9a.

In its first question, the State contends that, by failing to accept the Kentucky Supreme Court's ruling as binding, the Sixth Circuit committed a "textbook" violation of 28 U.S.C. 2254 (d)(1) ("AEDPA") by engaging in simple "second guessing" of the state court ruling. Pet. 15-16. Taken on its own terms, the State's request is for "simple error correction" – which is not a reason for this Court to take a case. *See e.g., Kyles v. Whitley*, 514 U.S. 419, 422, n.1 (1995).

But what the State is really proposing is a radical departure from this Court's established habeas jurisprudence. It is fundamental that a federal court reviewing a state court judgment may look to a general principle announced by this Court and determine whether the state court unreasonably failed to apply those principles to specific factual circumstances. Indeed, in the

very first AEDPA case ever decided by this Court, this Court noted that a "state-court decision also involves an unreasonable application of this Court's precedent if the state court... unreasonably refuses to extend [a legal] principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). As noted more recently by Justice Kennedy, writing for the Court in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007): "That the standard is stated in general terms does not mean [a state's more specific] application was reasonable." *See also id.* (*quoting Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., conc.)) ("AEDPA does not 'require ... some nearly identical factual pattern before a legal rule must be applied'").

There is no reason to depart from this Court's AEDPA constructions. One of the simplest reasons for denying the State's request for review is that the construction of AEDPA urged by the State is simply not supportable and contrary to this Court's long-standing AEDPA authority. There is no need to change this clear standard.

In its second question, the State contests a pure application of *O'Neal v. McAninch*, 513 U.S. 432 (1995), where the majority found that in the circumstances of Woodall's case there existed "grave doubt." *Woodall*, 685 F.3d at 580-581, Apx. 9a-12a. The State's only argument boils down to a disagreement with the result, whether "grave doubt" exists, arguing that the majority erred in applying *O'Neal*. Pet. 23-24. A debate over whether a constitutional error is prejudicial in a fact intensive case does not merit cert review just because a party is dissatisfied with how a federal district court and a circuit court of appeals ruled on the issue. Again, taken on its own terms, the State's request is for "simple error correction" – which is not a reason for this Court to take a case. *See, e.g., Kyles*, 514 U.S. at 422, n.1.

STATEMENT OF THE CASE[4]

The State correctly notes that the trial prosecutor did not oppose or object to the *Carter* instruction requested by Respondent. Pet. p. 8.[5] However, the State inaccurately states that the trial court never indicated that it would use Respondent's silence against him. This simply ignores the trial court's on-the-record statements.

In that ruling, the trial court stated that he would not tell the jury that "you can go out and rape, murder and kidnap and admit it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that." TE 1591, JA 71.[6] Stated another way, the trial court denied the *Carter* instruction on the basis that the jury could consider the failure of Respondent himself to offer "testimony" and the lack of an "explanation," which would be logically expected and common sense dictated. The motive behind the trial court's ruling was that it would be "illogical," "defy common sense," and that it would be "intellectually dishonest" to provide such an instruction. TE 1589, 1591, JA 69, 71.

Consistent with Respondent's reading of the record and contrary to the State's statement, the district court aptly noted that the trial court used Respondent's silence against him "...given the fact that the trial judge so forcefully stated on the record that he felt that the jury could consider Woodall's failure to offer an explanation for the crimes. If the trial judge, a man trained in the law, held this fact against Woodall... ." Slip Op. p. 22, Apx. 63a. The majority echoed

---

[4] The evidence and procedural history of this case is set out accurately in the opinions filed below. *See*, Apx. 3a-5a, 33a-37a. This summary is offered for the Court's convenience and to respond to certain representations made in the State's Petition which Respondent views as inaccurate or incomplete.

[5] The tendered instruction read: "A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." TR 1099, JA 153.

[6] During voir dire, the trial court refused the defense's request that it be allowed to ask prospective jurors if they understood that Respondent did not have to testify during the penalty trial and whether any decision to do so would be held against him. TE 697, JA 141.

this sentiment, noting "the trial court itself appears to have drawn an adverse inference from Woodall's decision not to testify." *Woodall*, 685 F.3d at 581, Apx. 11a.

Setting this aside, the trial court's ruling was manifestly incorrect. In *Carter*, 450 U.S. 288, the Court held that if a defendant requests, a court must instruct the jury that the defendant has no obligation to testify and that no adverse inference can be drawn from his failure to do so. The Court reasoned that a trial judge has the "constitutional obligation to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Id.* at 303. Further, this Court held in *Estelle*, 451 U.S. 454, there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Id.* at 462-63.

Thus, while the trial court felt it was "illogical," "intellectually dishonest" and "lacked common sense" to protect Respondent's Fifth Amendment rights at his sentencing hearing, *Estelle* had noted decades before that a capital defendant possessed such protections regardless of a conviction, i.e. that there was no there was "no basis to distinguish between the guilt and penalty phases." *Estelle* did not distinguish between guilt derived from a trial versus a plea. Further, while the trial court expected an explanation, this Court has held that requiring an explanation also violated the Fifth Amendment. *Mitchell*, 526 U.S. 314. Quite pointedly in *Mitchell*, this Court noted that:

- "To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327.[7]

[7] Obviously, this Court's finding as to what common sense dictates contradicts and overrides the trial court's common sense view to the contrary.

- "The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing." *Id.* at 329.

The State also downplays the vehemence and analysis of the dissent from Respondent's direct appeal case. *See Woodall v. Commonwealth*, 63 S.W.3d 104, 134-35 (Ky. 2002). Justice Stumbo noted that the majority opinion, by focusing solely on the guilt phase, was contrary to this Court's *Mitchell* decision noting:

> The majority opinion states that this is not an error because Appellant entered a guilty plea to the charges and the evidence of guilt was overwhelming. Because he pled guilty, according to the majority, a no adverse inference instruction could have no effect on a determination of guilt and, thus, no negative inferences could be drawn by the jury from Appellant's silence.
>
> The plain language of *Mitchell v. United States*, 526 U.S. 314 [] (1999), disputes the conclusion reached by the majority. Therein, the United States Supreme Court stated as follows:
>
> > The rule against adverse inferences from a defendant's silence in criminal proceedings, including sentencing, is of proven utility. Some years ago the Court expressed concern that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." ... [T]here can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition.... The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.
>
> *Mitchell*, 526 U.S. at 329 [], quoting *Ullmann v. United States*, 350 U.S. 422 [] (1956).
>
> The majority would have us eradicate the important Constitutional right involved here by failing to require the trial court to give the requested instruction. The majority states that the instruction is not necessary because Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes. That may be so, but Appellant did contest the sought penalty of death during his

> penalty phase trial. He cross-examined the eleven witnesses presented by the Commonwealth and presented fourteen witnesses of his own who testified about Appellant's life and the effects his upbringing had on him. As noted in *Mitchell*, 526 U.S. at 327 [], "it appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of [his] guilt or innocence than with the severity of [his] punishment." For Appellant herein the stakes could not have been higher and his Fifth Amendment rights could not have been more important.

Woodall, 63 S.W.3d at 134-35; Apx. 309a-311a.

Subjecting the claim to AEDPA review, the district court concluded that the Kentucky Supreme Court's decision was an unreasonable application of this Court's clearly existing federal law:

> The issue before the Court is whether Woodall was entitled to a no adverse inference instruction. Unquestionably, Woodall was entitled to it. In this case, Woodall pleaded guilty to the underlying substantive offenses. He did not, however, agree that the sentence of death was appropriate. Instead, he retained the right to have his sentence determined by a jury of his peers. His Fifth Amendment right survived his guilty plea. *Mitchell v. United States*, 526 U.S. at 327. The government could not have compelled Woodall to testify against his will at his sentencing hearing. *Estelle v. Smith*, 451 U.S. at 454. Such conduct would have undoubtedly violated his Fifth Amendment right. *Id.* Woodall requested a no adverse inference instruction. Once requested, it should have issued. *Carter v. Kentucky*, 450 U.S. at 305. The trial judge could have given the requested instruction and prevented any undue and impermissible speculation by the jury. Even though the prosecution did not object to the instruction, the trial judge refused to issue it. In doing so, he ran afoul of clearly established constitutional principles and violated Woodall's constitutional rights. This is not a new rule of law as the Commonwealth argues. To the contrary, it is a logical application of then-existing Supreme Court precedent. And, the Kentucky Supreme Court's decision to reject this claim was an unreasonable application of *Carter*, *Estelle*, and *Mitchell*.

Slip Op. pp. 19-20; Apx. 59a-61a. Thus, the district court found the Kentucky Supreme Court's categorical exclusion of the Fifth Amendment at a capital sentencing hearing was an unreasonable application of clearly existing federal law from this Court.

The majority opinion of the Sixth Circuit correctly affirmed, finding that:

> The Kentucky Supreme Court's denial of this constitutional claim was an unreasonable application of *Carter, Estelle*, and *Mitchell*. *See Williams*, 529 U.S. at 407 ("[A] state-court decision [is] an unreasonable application of [the Supreme] Court's precedent if the state court ... unreasonably refuses to extend [a legal] principle to a new context where it should apply."); *Mason v. Mitchell*, 543 F.3d 766, 772 (6th Cir. 2008) ("Clearly established law ... encompasses more than just bright-line rules laid down by the Supreme Court. It also clearly includes legal principles and standards enunciated in the Court's decisions." (alterations and internal quotation marks omitted)). The district court held that a capital defendant has a *Fifth Amendment* right to a "no adverse inference" instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement. We agree. "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Estelle*, 451 U.S. at 463. At stake in the penalty phase of a capital trial such as Woodall's is not only what specific punishment the defendant will receive, but whether he will be put to death. The *due process clause* requires that a trial court, if requested by the defendant, instruct the jury during the penalty phase of a capital trial that no adverse inference may be drawn from a defendant's decision not to testify.

Woodall, 685 F.3d at 579; Apx. 8a-9a. The majority opinion did not "substitute" its judgment for the Kentucky Supreme Court's; rather, the majority opinion properly stated the AEDPA standard. *Woodall*, 685 F.3d at 578, Apx. 5a.

The majority opinion then explored the applicable and clearly established Supreme Court precedent. *Id.* at 578-579, Apx. 5a-8a. Thereafter, the majority examined the Kentucky Supreme Court's decision in the context of this Courts precedent and concluded the state court's decision was an unreasonable application of that precedent, applying AEDPA as defined by this Court. *Woodall*, 685 F.3d at 579, *citing to Williams*, 529 U.S. at 407; Apx. 9a. In taking this measured approach, the majority thoughtfully required Respondent to overcome AEDPA prior to considering whether Respondent was entitled to relief.

ARGUMENTS AS TO WHY CERTIORARI SHOULD BE DENIED

I. THERE IS NO REASON FOR THIS COURT TO SECOND-GUESS ITS LONG-STANDING AND WELL-SETTLED AEDPA PRECEDENT THAT A STATE COURT CAN UNREASONABLY REFUSE TO APPLY A GENERAL CONSTITUTIONAL PRINCIPLE TO A PARTICULAR SET OF FACTS.

The petition for certiorari does not raise any question that warrants review by this Court. There is neither a misapplication of this Court's authority nor is there a conflict between the Sixth Circuit's ruling and the decision of any other court of appeals. Indeed, each court of appeals has applied AEDPA in the same fashion as the majority opinion herein.

Petitioner attempts to manufacture a conflict with a statement from one of this Court's precedents. However, the record does not support the Petitioner's asserted conflict. Setting this aside, the purported conflict involving federal sentencing guideline cases does not control federal habeas review of state capital sentencing proceedings.

A. The Majority Followed AEDPA.

As noted above, the State's main contention is that AEDPA was violated because the Sixth Circuit "second-guessed" the Kentucky Supreme Court's determination. In so arguing, the State advocates a construction of AEDPA that this Court has heretofore rejected, and it would constitute a sea change to this Court's AEDPA jurisprudence.

In this Court's very first AEDPA case, this Court noted that a "state-court decision also involves an unreasonable application of this Court's precedent if the state court... unreasonably refuses to extend [a legal] principle to a new context where it should apply." *Williams*, 529 U.S. at 407. Likewise, in *Wiggins v. Smith*, 539 U.S. 510, 520 (2003), this Court echoed that "a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'"

This Court has specifically found a state court decision unreasonable for refusing to apply a principle derived from a series of cases. *See Tyler v. Cain*, 533 U.S. 656, 666 (2001) (multiple cases can dictate a result); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 259-264 (2007) (same). Justice Kennedy, writing for the Court in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), noted: "That the standard is stated in general terms does not mean [a state's more specific] application was reasonable." *See also id.* (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., conc.)) ("AEDPA does not 'require ... some nearly identical factual pattern before a legal rule must be applied'").

This Court has not departed from this approach, and the State agrees. Indeed, the State even describes this component in its cert petition. Pet. p. 16 ("AEDPA does not require a 'nearly identical factual pattern before a legal rule must be applied.' *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)").

In short, AEDPA requires an issue-by-issue examination of the state court's treatment of a claim. A reviewing court must faithfully apply AEDPA to the legal claim and state court record before it in the context of this Court's clearly existing federal law. Thus, this Court's AEDPA analysis rebuts the State's suggestion that just because Respondent won, AEDPA was violated; rather, it reinforces that the State's chief complaint is that it simply disagrees with the result of the court below.

What the State proposes is contrary to a fundamental rule of federal habeas jurisprudence, long-adopted by this Court. In ascertaining the basis for the state courts' rejection of a federal constitutional claim, federal courts must look to not just one case when considering a general principle. The State proposes to change that rule to require federal courts to deny relief, unless and until there is black letter authority directly on point.

The Sixth Circuit merely applied this Court's AEDPA authority as to a legal question and the state court record before it. In so doing, the Sixth Circuit identified and applied the required and the correct AEDPA standard from *Williams*, 529 U.S. at 407, Apx. 8a. Applying this AEDPA standard, the Panel concluded that the state court unreasonably determined Respondent's *Carter* instruction claim. *Id.*, Apx. 8a-9a

Thus, the writ should be denied because the State makes the unexceptional request that this Court grant certiorari to review properly stated, settled legal principles to the *Carter* instruction request of this case. Under such circumstances, certiorari is simply not warranted. *See* Supreme Court Rule 10 (certiorari not warranted where lower court applied facts to properly stated rule of law); *Kyles*, 514 U.S. at 422, n.1; *id.* at 456 (Scalia, J., dissenting).

B. No Conflict Among The Circuits.

It is also important to note a contention that is missing from the State's petition: there is no suggestion that the Court must intervene to resolve a split among the federal appellate circuits. Indeed, the one habeas case cited by the State in its Petition assumed that there was a requirement to comply with a Carter instruction request at the penalty hearing of a capital case. *See Edwards v. Roper*, 688 F.3d 449 (8th Cir. 2012) cited at Pet. p. 19. Thus the Sixth Circuit's conclusion is entirely congruent with the decision of the other federal circuit court to address this issue.

Indeed, the State even recognizes that the panel majority "got it right" when it acknowledged that "the Fifth Amendment privilege extends to the sentencing phase of criminal trial and that a generic guilty plea does not waive the right." Pet. p. 18. But then, the State indicates that *Carter* protections do not apply. This Court has never indicated that the Fifth Amendment applies at a capital sentencing hearing with the exception of *Carter*; simply, the

Fifth Amendment applies (as conceded by the State) and that necessarily encompasses the *Carter* protections. There is no exception to this Court's seemingly clear pronouncement in *Estelle*, 451 U.S. at 462-63, that there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees."

The State is trying to parse the authority of this Court too fine, just as the Government did in *Mitchell*. This Court rejected a similar parsing of constitutional principles holding:

> To say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*. We are unwilling to truncate our precedents in this way.

Mitchell, 526 U.S. at 329. The State is urging a similar truncation of this Court's precedents.

The writ should also be denied because the State cannot demonstrate a conflict between the judgment below and the decision of any other federal court of appeals as to *Carter's* applicability. *See* Supreme Court Rule 10(a). While the State in a footnote notes a *possible* conflict on the application of *Mitchell* in varying and diverse circumstances from Respondent's case (Pet pp. 19-20 n. 4),[8] the State specifically disavows requesting cert on that alleged conflict. Pet p. 21 ("...Court need not, of course, decide the correct interpretation of *Mitchell* for purposes of this case.")

Further, there is no conflict with the Sixth Circuit's AEDPA analysis because every other Circuit Court has followed the dictates of this Court - from *Williams* through *Panetti* - that a

---

[8] Respondent does not concede a conflict pertinent to this case exists. Also, the conflict that Petitioner asserts is overblown. Only one case cited by Petitioner actually extends *Mitchell* beyond *Mitchell's* holding: *United States v. Caro*, 597 F.3d 608 (4th Cir. 2010). The two other alleged extension cases do not even mention *Mitchell* in their opinions. Both are actually cases on post-arrest silence, which is a different issue. In the end, though, Petitioner simply wants to reframe the issue and ignore the real matter before the Court. *See* Section C, *infra*.

legal principle sometimes must extend to a new context. *See e.g. Gattis v. Snyder*, 278 F.3d 222, 234 (4th Cir. 2002) *cert. denied* 123 S.Ct. 660 (2002); *Brooks v. Dretke*, 444 F.3d 328, 329-332 (5th Cir. 2006); *Gautt v. Lewis*, 489 F.3d 993, 1004 (9th Cir. 2007) *cert denied* 128 S.Ct. 1477 (2008). Each of the just cited cases also relies on multiple holdings of this Court to reach their respective results. *Id.* Further, other circuits, while not specifically applying the principle, noted that it is the proper test. *See e.g. Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000); *Carter v. Kemna*, 255 F.3d 589, 591 (8th Cir. 2001).

Thus, the State's argument regarding application of the AEDPA standard does not satisfy any of the established criteria for this Court to grant review on *certiorari*. There is no active controversy amongst the Courts of Appeals regarding the issue.

C. This Case is Not About Remorse.

The State's reliance on the below dissent's "remorse" arguments also misapprehends the underlying constitutional issues at play. At issue is much, much more. In relying on this isolated principle, the State seeks to manufacture a cert question. However, neither the record below nor this Court's authority supports the State's attempt.

There are two critical short-comings with this argument. First, the argument hinges upon an assumption that once the plea was entered the only improper inference that could be made by Respondent's jury related to a lack of remorse. However, this is not simply about "remorse;" the trial court explained this was also about an expectation of "testimony," and an "explanation." TE 1591-92, JA 71-72; *see Mitchell* (finding Fifth Amendment violation when lack of explanation used against defendant). Thus, the State is attempting to shoe-horn this "round-peg" of a legal issue into a "square hole."

Second, this wrongly assumes something that is not true – that once Respondent pled guilty, there was no longer anything being contested. *See* Pet. p. 18 ("…in the absence of disputed facts (as in Woodall's case), Woodall's silence would demonstrate only a lack of remorse"). The State simply ignores this Court's authority, and Kentucky death penalty procedures as reflected by the actual instructions given to Respondent's jury during a contentious penalty phase.

Indeed, this Court has been crystal clear that there is no difference between the guilt and penalty phase in a capital case. *Estelle*, 451 U.S. at 462-63 (there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. **Given the gravity of the decision to be made at the penalty phase**, the State is not relieved of the obligation to observe fundamental constitutional guarantees.") (emphasis added). Thereafter in *Mitchell*, 526 U.S. 314, this Court noted that:

- "To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327.
- "The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing." *Id.* at 329.

As further noted in *Mitchell*, the State cannot "enlist the defendant in this process [of securing a more severe punishment] at the expense of the self-incrimination privilege." *Id.* Consequently, the State is asking this Court to revisit a well-worn and decided issue, upon which the Sixth Circuit followed this Court's existing precedent.

Further, it is worth noting that the State never sets out or acknowledges the trial court's instructions to the jury, which conflict with its arguments. In those instructions, the trial court noted that the jury "will presume [Respondent] innocent of these aggravating circumstance or

circumstances" (Instruction 1 (TR 1137, JA 159)), and that the jury had to "consider such mitigating or extenuating facts" that they "believe to be true" (Instruction 4 (TR 1140, JA 162)). Critically, Instruction No. 6 rebuts the State's point, where the trial court instructed Respondent's jury about what was being contested:

> If you have a reasonable doubt as to the truth or existence of one or both of the aggravating circumstance or circumstances listed in Instruction No. 2, you shall not make any finding with respect to it.
>
> If upon the whole case you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.

TR 1142, JA 164. Thus, the jury, despite the guilty plea, was not automatically required to find the aggravators.

More importantly, however, the jury was not required to fix a death sentence if "upon the whole of the case" they had a "reasonable doubt" it was appropriate, i.e. Kentucky does not have an automatic death penalty. Put another way, the jury was required to make a finding that no reasonable doubt existed as to a death sentence. This decision encompassed more than just the aggravation and mitigation. It also encompassed an explanation for the crime – something Respondent never provided. The trial court should have given a no adverse inference instruction. It then would have been clear that Respondent's silence about the "whole of the case" should not have been held against him.

Respondent's penalty phase was a contentious proceeding. As in *Mitchell*, there were facts in dispute for the fact-finder. Respondent's low IQ, the conditions of his upbringing, and his sexual abuse were all disputed issues. The State contested all the mitigation presented via Respondent's fourteen witnesses and presented eleven witnesses in support of the aggravation and to rebut Respondent's mitigation. A single juror could have prevented death. *Wendling v.*

Commonwealth, 137 S.W. 205, (Ky. 1911) (Section 7 of the Kentucky Constitution provides the right to a trial by jury and that all of the jurors must agree upon the verdict.)

The analytical heart of the State's petition is its argument that only an expression of remorse relates to the failure to provide a *Carter* instruction. Not only is there no such artificial distinction, but the record specifically refutes such a contention via the statements of the trial court requiring "testimony" from Respondent and an "explanation," and the jury instructions which delineated the very real life and death decision being contested before the jury. The heart of the State's argument is thus made entirely of straw.

D. Conclusion.

Despite the State's many inventions, what is absent from the State's petition is any cogent explanation as to why this case deserves the Court's review on certiorari. The petition clearly fails to meet any of this Court's traditional criteria. The State does not even pretend that the Sixth Circuit's opinion is in conflict with a decision of any of the other federal Courts of Appeals. *See*, Supreme Court Rule 10(a). Indeed, the Sixth Circuit's AEDPA and *Carter/Estelle/Mitchell* analysis is completely congruent with that of the other Circuits.

Nor is there any colorable suggestion that the Sixth Circuit has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a). On the contrary, the Sixth Circuit's opinion in this case demonstrates a scrupulous effort to apply AEDPA's precise principles and tools set out by this Court's several opinions in the area. While the State certainly takes exception with the Sixth Circuit's thinking, and the result reached using those principles, that is obviously not a reason for this Court to expend its resources for error correction. *See, e.g.*, *Kyles*, 514 U.S. at 422, n.1.

For the same reason, it is manifest that the Sixth Circuit did not decide some new question of federal law that requires this Court's attention or that conflict with this Court's precedent. *See*, Supreme Court Rule 10(c). The Sixth Circuit simply examined the state court's resolution of a *Carter* claim under the standard set out in §2254(d)(1), and it used the same analytical methods endorsed by this Court in *Williams* through *Panetti*.

II. THE SIXTH CIRCUIT SIMPLY APPLIED THIS COURT'S LONG-STANDING *O'NEAL V. MCANINCH*, 513 U.S. 432 (1995).

Petitioner's second stated reason for wanting this court to grant a writ of certiorari is nothing more than its dissatisfaction with the result: " [t]he Sixth Circuit compounded its failure to abide by AEDPA by finding that the alleged error was not harmless." Pet. 21.

After deciding the state court decision involved an unreasonable application of this Court's clearly existing federal law, the Sixth Circuit proceeded to harmless error review. *Woodall*, 685 F. 3d at 6-8, Apx. 8a-12a.. The Court addressed the question of whether the Kentucky Supreme Court's error "substantially influenced the jury's decision." *O'Neal*, 513 U.S. at 436.[9] The majority considered "all that happened" in the trial before deciding it could not "conclude that this case is harmless error." *Woodall*, 685 F.3d at 7, Apx. 11a-12a.

In weighing the impact of the error in light all that happened in the trial[10], the majority observed that the finding of aggravating circumstances was not the end of its analysis because "the jury could have rejected the death penalty even if it found the existence of aggravating circumstances beyond a reasonable doubt." *Id.* Indeed, the trial record is far from one sided. The State misapplies the harmless error standard by ignoring Petitioner's evidence presented in mitigation of a death sentence. Pet. 23-24 (quoting Dissent at Apx. 27a). Again, the issue at

---

[9] In *O'Neal*, this Court reversed the Sixth Circuit for failing to give the benefit of "grave doubt" to the habeas petitioner.

[10] *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (The proper inquiry is whether, in light of the record as a whole, the error "had substantial and injurious effect or influence in determining the jury's verdict.")

hand was imposition of a penalty, not guilt; thus, the State focuses on the wrong stage of the proceedings. *See Mitchell*, at 329-330 ("well-established that Fifth Amendment survives even after guilt determined")

While the record shows that the jury heard evidence of Petitioner's criminal acts, the jury also heard evidence in mitigation of penalty including that Keith Woodall possesses borderline limited intellectual functioning with a I.Q. test in high school of 74 (TE 1374, 1501);[11] physical and financial abandonment in early childhood by one parent (TE 1415, 1419, 1438, 1454, 1478) and severe neglect likely resulting from mental illness from the other parent (TE 1408-1411); sexual abuse (TE 1581); and extreme poverty (TE 1410, 1435).

The Sixth Circuit's "consideration of all that happened" at trial was proper and necessary under this Court's law. When the jurors were allowed to speculate about why Petitioner did not testify, one or more may have speculated, among other things, that Petitioner's borderline intellectual functioning was insignificant, that he did not care to offer any explanation about the crimes or the other charged and uncharged sexual offenses for which they had heard evidence, or that his mitigation witnesses were not credible (or at least that the dysfunctional upbringing and sexual abuse they heard about did not really have any effect on Petitioner because he did not bother to explain it to them, himself).

Furthermore, the Sixth Circuit recognized that the failure to give the no-inference instruction may be harmless. *Woodall*, 685 F.3d at 580-81, Apx. 10a.-11a. But, the majority also recognized that it cannot lightly discount the possible prejudicial effects of such error as the Warden does in his petition. *Id.* As this Court well knows, the right to receive a no-inference instruction was created in recognition of the fact that "many, even those who should be better

[11] Dr. Denis Keyes, who was cited by this Court in *Atkins*, has indicated that additional testing is merited in Respondent's case. R. 28-2, 30-2, JA 120-23, 118-19. Woodall's score is within the recognized five point standard deviation; additionally, trial counsel averred that a score of 68 was misplaced by them. (TR 235, JA 175).

advised, view [the fifth amendment] privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are ... guilty of crime...." *Carter*, 450 U.S. at 302 (quoting *Ullman v. United States*, 350 U.S. 422, 426 (1956)). Viewing the evidence with these cautions in mind, the majority correctly relied upon *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995) to conclude that in the circumstances of Woodall's case there existed "grave doubt." *Woodall*, 685 F.3d at 580-581, Apx. 11a-12a.

The Warden complains that the majority was merely speculating. This, however, is the nature of assessing prejudice, and this Court has faulted a state court for refusing to conduct the applicable standard of review on the basis of speculation. *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010) (State court ruled it could not "speculate" as to what the effect of additional evidence would have been, this Court reversed noting *Strickland* "will necessarily require a court to 'speculate' as to the effect of the new evidence."). Just as a reviewing court will have to assess the evidence within the context of a *Strickland* claim, conducting the *Brecht/O'Neal* analysis "will necessarily require a court to 'speculate' as to the effect of the" error.

The Warden's only argument boils down to a disagreement with the result, arguing that the majority erred in applying *O'Neal*. The only disagreement is over whether "grave doubt" exists. A debate over whether a constitutional error is prejudicial in a fact intensive case does not merit a writ of certiorari.

Indeed, in *California v. Roy*, 519 U.S. 2, 5 (1995), this Court reiterated the "grave doubt" standard where, this Court noted: "[i]n *O'Neal*, supra, this Court added that where a judge, in a habeas proceeding, applying this standard of harmless error, 'is in grave doubt as to the harmlessness of an error,' the habeas 'petitioner must win.' 513 U.S. at 437." Some courts have granted habeas relief applying this standard (*see Wood v. Ercole*, 644 F.3d 83, 99 (2nd Cir.

2011), *Tucker v. Varner*, 83 Fed. Appx. 462, 467-468 (3rd Cir. 2003), *Sherrors v. Woodford*, 425 Fed. Appx. 617, 620 (9th Cir. 2011)), while others have been denied relief. *See Lee v. Smeal*, 447 Fed. Appx. 357, 361-362 (3rd Cir. 2011); *Jones v. Polk*, 401 F.3d 257, 265-266 (4th Cir. 2005); *Tyson v. Trigg*, 50 F.3d 436, 447 (7th Cir. 1995); *Turner v. Hernandez*, 357 Fed. Appx. 797, 799 (9th Cir. 1995); *Tuttle v. Utah*, 57 F.3d 879, 892 (10th Cir. 1995). In short, the State is not indicating that the *O'Neal* standard is unworkable or that federal courts are struggling with its application; they are simply dissatisfied with the result herein.

Further, what is incontestable is that the number of cases which are decided by the "grave doubt" standard, as noted in *O'Neal*, are rare. Indeed, the State does not cite a single one that generates a conflict or problem area. Thus, there are not – and never will be – enough such cases to warrant the expenditure of this Court's time and resources to consider the application of a settled standard.

In conclusion, the Sixth Circuit's opinion is not in conflict with a decision of any of the other federal Courts of Appeals. *See*, Supreme Court Rule 10(a). Indeed, the Sixth Circuit's application of *O'Neal* is completely congruent with that of the other Circuits. Further, there is no colorable suggestion that the Sixth Circuit has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a). While the State certainly takes exception with the Sixth Circuit's thinking, and the result reached using those principles, that is obviously not a reason for this Court to expend its resources for error correction. *See, e.g., Kyles*, 514 U.S. at 422, n.1.

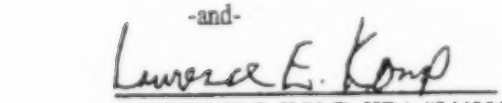
CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

DENNIS J. BURKE, KBA #87278
Assistant Public Advocate
DEPARTMENT OF PUBLIC ADVOCACY
207 Parker Drive, Suite 1
LaGrange, Kentucky 40031
502/222-6682
Fax: 502/222-3177

-and-



LAURENCE E. KOMP, KBA #84430*
Attorney at Law
P.O. Box 1785
Manchester, MO 63011
636/207-7330
Fax: 636/207-7351

COUNSEL FOR RESPONDENT,
ROBERT KEITH WOODALL

*Counsel of record

APPENDIX TO BRIEF IN OPPOSITION

that right to do so? Do you understand that?

DEFENDANT: Yes sir.

THE COURT: After conference and consultation with your attorneys you have chosen and you chose voluntarily not to testify in this case?

DEFENDANT: Yes sir.

THE COURT: Okay. While we're in here -- let's go off the record just a minute.

(Off record discussion.)

THE COURT: Okay, we are reviewing instructions.

MS. GIORDANO: Judge, I don't have a copy of the sentences, the ones that we looked at last week. Are they the same? Have you made any changes?

THE COURT: They're the same except for the adding of the mitigating circumstances. Do you want to look at them?

MS. GIORDANO: Yeah.

THE COURT: I'm going to go ahead and address the other issue --

MS. GIORDANO: Okay, that's fine.

THE COURT: -- the tendered instruction. It was on my desk. I guess it's still there. The defendant has tendered an instruction to be given

Supplied by the Administrative Office of the Courts-1588-
for Official Court of Justice Use Only

at this sentencing stage on the defendant's right not to testify, and I'm going to refuse that tendered instruction. It is marked and tendered, and I think I need to state my grounds for the record. I don't think that the Commonwealth objected to it being read. Is that correct?

MR. VICK: That is correct, your honor.

THE COURT: And the Court -- it might be a easy way out to go ahead and give it, except I don't think intellectually honest and I don't think it's in keeping with the case law as far as sentencing is concerned. The Court has the responsibility of not just giving instructions to juries just for the sake of protecting the record and being beyond abundance of caution. It's the responsibility of the Court not only to be a gatekeeper to evidence, but also to be fair on the law. This defendant has waived his right to self-incrimination and has entered pleas to committing the crimes of rape and murder and kidnapping and has asked the jury to set his sentence. The Court is aware of no case law that precludes the jury from considering the defendant's lack of expression of remorse or explanation of the crime or anything else once guilt has been adjudged

Supplied by the Administrative Office of the Courts-1589-
for Official Court of Justice Use Only

in sentencing. In fact, the case that the Court has looked to, the case of Commonwealth versus McIntosh, which is a 646 S.W. 2d 43 case, and the best I can tell from Shepardizing it, the latest statement on this issue, and it was a case where the instruction was not given in the guilt or innocence phase, and the Court -- I don't know whether it was the Court of Appeals or the Supreme Court -- the Supreme Court of Kentucky said that it was not error where the guilt was overwhelming, and here we have a guilty plea. I just don't think that it's appropriate to instruct the jury that the failure of the defendant to take the stand when he stands convicted of these very serious crimes is in keeping with the law.

MS. GIORDANO: What was the cite on that?

THE COURT: 646 S.W. 2d 43. Didn't I cite that?

MS. GIORDANO: I think you did. We just didn't --

THE COURT: Okay. Anyway, do ya'll want to add anything on that in support of that instruction?

MR. BAKER: We'd just like to read the case if it's -- while we're doing this.

Supplied by the Administrative Office of the Courts-1590-
for Official Court of Justice Use Only

THE COURT: It's pretty short.

MR. BAKER: Yeah, that's what I noticed.

THE COURT: And after you read it if you want to come back and put something on the record, we'll let you do so. Let's go off the record a minute.

(Off record discussion.)

THE COURT: This is their response.

MR. BAKER: Judge, just having read that one page decision, the case seems to me to read that it certainly is error, but they might not reverse you on that seems to be the holding on that, but it does hold it's error. It just is it -- in that case are they going to hold it large enough error to reverse on. So we would read that -- or I would read that as the Supreme Court saying that it's error not to give that instruction, and that would be the controlling case law, and that we were therefore entitled to it.

THE COURT: There's no question I'd give it if we were talking about guilt or innocence. In the sentencing stage to me it defies logic, it defies common sense, it's not intellectually honest to tell this jury -- I'm not trying to convince you all -- I'm just trying to make the record clear -- to tell this jury, the Court of law telling -- this

Supplied by the Administrative Office of the Courts-1591-
for Official Court of Justice Use Only

is the law of Kentucky that you can go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that. I just don't think it's logical, so that's why I'm not going to give it.

MR. BAKER: Historically, I think you have the right not to testify because of the certain deficits you have vis-a-vis the Commonwealth. You don't have the access to police primarily, and that's why you have that right and you don't have to get up there and incriminate yourself, and I think the same thing would apply to penalty. That if there's a reason you have that constitutional right not to testify, it would be all the more so in a death penalty case not to have to get up there.

THE COURT: Well, we'll see, I'm sure.

MR. BAKER: I'm not going to convince you, am I, your honor?

THE COURT: We'll see.

MS. GIORDANO: Okay. We'll be glad to see.

THE COURT: Well, it would be easier for me to give, but I just feel I have a responsibility to the Court --

Supplied by the Administrative Office of the Courts-1592-
for Official Court of Justice Use Only

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAR 2 5 2013
OFFICE OF THE CLERK

No. 12-794

Supreme Court of the United States

RANDY WHITE, WARDEN,
Petitioner,

v.

ROBERT KEITH WOODALL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz*
Assistant Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342
susan.lenz@ag.ky.gov

Counsel for Petitioner
Commonwealth of Kentucky

*** Counsel of Record**

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. As in *Parker v. Matthews*, certiorari is warranted to address the Sixth Circuit's grant of federal habeas corpus relief in the absence of "clearly established Federal law, as determined by [this Court]." 3

II. Certiorari is warranted to address the Sixth Circuit's use of a "possible-harm" standard in finding that the alleged error was not harmless, rather than the *Brecht v. Abrahamson* standard of "substantial and injurious effect." 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Bowling v. Commonwealth,
942 S.W.2d 293, 306 (Ky. 1997) 7

Brecht v. Abrahamson,
507 U.S. 619 (1993) 2, 8, 9

Carey v. Musladin,
549 U.S. 70 (2006) 4

Carter v. Kentucky,
450 U.S. 288 (1981). 1, 3, 5, 6

Chaidez v. United States,
133 S.Ct. 1103 (February 25, 2013) 5

Estelle v. Smith,
451 U.S. 454 (1981) 1, 5, 6

Harrington v. Richter,
131 S.Ct. 770, 786-787 (2011) 1

Hodge v. Commonwealth,
17 S.W.3d 824, 854 (Ky. 2000) 7

Hodge v. Haeberlin,
2006 WL 1895526, at 70-71 (E.D. Ky. 2006) 7

Lambrix v. Singletary,
520 U.S. 518, 538 (1997) 5

Meese v. Commonwealth,
348 S.W.3d 627, 723 (Ky. 2011) 8

Mitchell v. United States,
526 U.S. 314 (1999) 1, 3, 4, 5, 6

O'Neal v. McAninch,
513 U.S. 432 (1995) 8

Parker v. Matthews,
132 S.Ct. 2148, 2149 (2012) 2, 3

Perdue v. Commonwealth,
916 S.W.2d 148, 169 (Ky. 1995) 7

Ring v. Arizona,
536 U.S. 584 (2002) 6

Skaggs v. Commonwealth,
694 S.W.2d 672, 680 (Ky. 1985) 8

Wright v. Van Patten,
522 U.S. 120 (2008) 4

CONSTITUTIONAL PROVISIONS

Fifth Amendment 5

OTHER SOURCES

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 1, 2

28 U.S.C. §2254(d)(1) 1, 5

KRS 532.025 7

Kentucky Criminal Rules 9.82(1) and 9.88 8

CAPITAL CASE
REPLY BRIEF FOR PETITIONER

As shown in the Petition for Writ of Certiorari, the Sixth Circuit has once again completely failed to abide by 28 U.S.C. §2254(d)(1) in ruling that a no adverse inference instruction is constitutionally required in the penalty phase of a capital trial where the defendant has pled guilty to all crimes and aggravating circumstances and in ruling that the Kentucky Supreme Court's ruling to the contrary was unreasonable. This Court has never squarely addressed whether a prophylactic *Carter*[1] instruction is constitutionally required in the penalty phase of a trial, where a non-testifying defendant has pled guilty to all the crimes and aggravating circumstances.

Neither *Estelle*[2] nor *Mitchell*[3] extended the *Carter* remedy–a right to no adverse inference instruction–to the circumstances presented in this case. In the absence of clearly established Federal law, as determined by this Court, Woodall cannot show that the Kentucky Supreme Court's ruling on the claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S.Ct. 770, 786-787 (2011). Woodall ignores *Richter* in his Brief in Opposition.

The Sixth Circuit's decision to grant a writ of habeas corpus "is a textbook example of what the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable

---

[1] *Carter v. Kentucky*, 450 U.S. 288 (1981).
[2] *Estelle v. Smith*, 451 U.S. 454 (1981).
[3] *Mitchell v. United States*, 526 U.S. 314 (1999).

decisions of state courts.'" *Parker v. Matthews*, 132 S.Ct. 2148, 2149 (2012) (recently reversing the Sixth Circuit for substituting its own interpretation of Kentucky law in a capital case). AEDPA bars federal courts from granting habeas relief, in the face of the state court denial of relief on the merits, if there is no "clearly established Federal law, as determined by [this Court]" on the issue. Yet, that is precisely what the Sixth Circuit did here.

In addition, the Sixth Circuit, in finding that the alleged error was not harmless, compounded its failure to abide by AEDPA by improperly converting the *Brecht v. Abrahamson*[4] "substantial and injurious effect" harmless error standard into a "possible-harm" standard.

In his Brief in Opposition, Woodall nonetheless argues that the Sixth Circuit merely applied an established general rule to a new factual situation and properly applied harmless error review. As explained below, neither contention has merit.

---

[4] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

I. As in *Parker v. Matthews*, certiorari is warranted to address the Sixth Circuit's grant of federal habeas corpus relief in the absence of "clearly established Federal law, as determined by [this Court]."

There is no clearly established federal law regarding whether a no adverse inference instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to all the crimes and aggravating circumstances and no such facts are in dispute.

Woodall argues this case is merely about applying a general principle to a specific factual circumstance. Brief in Opposition, 4-5, 11-12. *Mitchell*, however, did not clearly establish that a no adverse inference *Carter* instruction is required in this case.

As explained in the Petition for Writ of Certiorari, pages 3-5, 9-11, and 13-19, *Mitchell* dealt specifically with the sentencing court drawing an adverse inference with respect to a fact which increased the sentencing consequences. Mitchell only admitted "some of" the amount of cocaine she had sold; the court told Mitchell it held her silence against her in determining the penalty range.[5] This Court pointed out that "[t]he

---

[5]Woodall alleges that Petitioner "inaccurately" states that the trial court never indicated it would use Woodall's silence against him. Brief in Opposition, 6. The relevance of this claim is questionable given the fact that Woodall was sentenced to death by a jury. In any event, the Petition for Writ of Certiorari, on page 8, quotes what the trial court said regarding its decision to not give the jury a no adverse inference instruction. The trial court never

Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Mitchell*, at 330. The *Mitchell* Court was clearly concerned with requiring the state to produce evidence against a defendant and not allowing the state to force the evidence from a defendant's "own lips." *Mitchell*, at 326. *Mitchell* did not permit a negative inference to be drawn about guilt with regard to factual determinations respecting the circumstances and details of the crime.

The *Mitchell* Court also noted, "[w]hether silence bears upon the determination of the lack of remorse, or upon acceptance of responsibility . . . is a separate question. It is not before us and we express no view on it." *Mitchell, at 330.*. Considering that *Mitchell* expressly exempted lack of remorse and acceptance of responsibility findings from its holding, and considering that Woodall pled guilty to all the crimes and aggravating circumstances, the Kentucky Supreme Court had good reason to believe that the Fifth Amendment did not require a *Carter* instruction.

As examples of this Court distinguishing between mere application of a general rule and the absence of clearly established law, see *Carey v. Musladin*, 549 U.S. 70 (2006); *Wright v. Van Patten*, 522 U.S. 120 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, 'it cannot be said that the state court unreasonabl[y]

---

indicated it would use Woodall's silence against him and never told the jury that it could do so. The jury heard nothing about Woodall's silence from either the trial judge or the State.

appli[ed] clearly established Federal law.'" "Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized."); *Chaidez v. United States*, 133 S.Ct. 1103 (February 25, 2013).

Although the Sixth Circuit found that *Estelle* extended a defendant's Fifth Amendment protection to the penalty phase and that *Mitchell* extended that protection where a defendant has pled guilty, neither *Estelle* nor *Mitchell* clearly established a constitutional right to a no adverse inference *Carter* instruction in the circumstances presented in this case. In fact, the Sixth Circuit could only cite to one of its own cases for the proposition that Woodall was entitled to a no adverse inference instruction. See Appendix to Petition for Writ of Certiorari, App. 7a.

In addition, *Estelle* and *Mitchell* are distinguishable, as both involved government or court actions that penalized the defendant by exposing the defendant to greater punishment for exercising the Fifth Amendment privilege. The punitive element so critical in *Estelle* and *Mitchell* – the State's use of the defendant's silence to impose greater punishment – is wholly absent in Woodall's case.

In order to prevail on federal habeas review, Woodall would have to show that his interpretation of the law is the *only* reasonable interpretation. *Cf. Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). Woodall cannot show that *no other* interpretation of the law is reasonable. This is especially so given that *Mitchell* expressly exempted lack of remorse and acceptance of responsibility findings from its holding.

In an effort to bring his case under the purview of *Mitchell*, Woodall argues that the sentencing hearing

was about far more than remorse in so far as extensive evidence about mitigating matters was introduced as well as evidence regarding the aggravating circumstances. Brief in Opposition, 15-17. Woodall argues that the jury instructions support his claim. A review of the instructions reveals that Woodall benefited from instructions to which he was not entitled. In addition, Woodall's argument that the sentencing hearing was about more than remorse misses the point that the mitigation part of sentencing is a discrete and fundamentally different part of sentencing than the part concerned with aggravating circumstances. *Carter*, *Estelle*, and *Mitchell* all concerned facts in which the prosecution had the burden of proof to convict or enhance the sentence. *Cf. Ring v. Arizona*, 536 U.S. 584 (2002).

Woodall first points out that Jury instruction No. 1 instructed the jury to presume him innocent of the aggravating circumstances unless it believed from the evidence that the aggravating circumstances existed beyond a reasonable doubt. Clearly, this instruction was both incorrect and superfluous as Woodall had already admitted guilt to all charges, including the aggravating circumstances. The aggravating circumstances were not contested.[6]

There were simply no facts regarding the

---

[6]During closing argument, trial defense counsel candidly explained to the jury that Woodall had pled guilty to the murder, kidnapping, and rape of Sarah Hansen because he was guilty. Transcript of Evidence 12, 1625-26. Specifically, trial defense counsel said, "[the prosecutor] has talked to you about aggravating circumstances, and I said before, and I will tell you again, he [Woodall] did those things. We do not deny that. We've not offered a defense to that. He did those things." *Id.*

circumstances of the crimes that were in dispute for the factfinder. To the extent Woodall argues that certain mitigating circumstances were in dispute, it should be pointed out that mitigating circumstances were to be proven by trial defense counsel, not by the State. In addition, the jury was instructed to consider mitigating circumstances under Instruction No. 4. Transcript of Record VIII, 1140.

It should also be pointed out that Kentucky is not a weighing state and did not have to weigh the mitigating circumstances against the aggravating circumstances. KRS 532.025; *Perdue v. Commonwealth*, 916 S.W.2d 148, 169 (Ky. 1995); *Bowling v. Commonwealth*, 942 S.W.2d 293, 306 (Ky. 1997); *Hodge v. Commonwealth*, 17 S.W.3d 824, 854 (Ky. 2000). Because Kentucky is a non-weighing state, Kentucky law permits a jury to consider non-statutory aggravating circumstances (such as lack of remorse) once a statutory aggravating circumstance has been found beyond a reasonable doubt. *Hodge v. Haeberlin*, 2006 WL 1895526, at 70-71 (E.D. Ky. July 10, 2006), affirmed on other grounds, 579 F.3d 627 (6th Cir. 2009).

Woodall also claims that the jury was not required to fix a death sentence if "upon the whole of the case" the jury had a "reasonable doubt" it was appropriate. He argues the jury was required to make a finding that no reasonable doubt existed as to the death sentence. Instruction No. 6, to which Woodall is referring, did not require the jury to make a finding of death beyond a reasonable doubt. Transcript of Record VIII, 1142. The Kentucky Supreme Court has ruled that KRS 532.025 does not require the jury to find that death is

the appropriate punishment beyond a reasonable doubt or to resolve any reasonable doubt in favor of a prison sentence. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 680 (Ky. 1985); *Meese v. Commonwealth*, 348 S.W.3d 627, 723 (Ky. 2011). Again, Woodall benefited from an instruction to which he was not entitled.

Woodall also asserts that a single juror could have prevented the death penalty. Woodall misunderstands Kentucky law. Kentucky law requires that all 12 jurors agree upon the verdict, including the sentence verdict, and the failure to do so in the penalty phase *requires a penalty phase retrial*. Kentucky Criminal Rules 9.82(1) and 9.88; *Skaggs v. Commonwealth*, 694 S.W.2d 672, 681 (Ky. 1985). In other words, Kentucky does not follow the "one juror veto" rule adopted in some states that permits a single juror to preclude a death sentence and require that the court impose a prison sentence.

II. Certiorari is warranted to address the Sixth Circuit's use of a "possible-harm" standard in finding that the alleged error was not harmless, rather than the *Brecht v. Abrahamson* standard of "substantial and injurious effect."

Woodall's Brief in Opposition, at page 21, argues that harmless error analysis requires the court to speculate regarding the effect of the alleged error and that the Sixth Circuit properly applied *O'Neal v. McAninch*, 513 U.S. 432 (1995). To the contrary, the Sixth Circuit improperly analyzed harmless error. A court of appeals cannot properly find error harmless

under *Brecht* by using the reasoning, "Because we cannot know what led the jury to make the decision it did, and because the jury may well have based its decision [to sentence Woodall to death] on Woodall's failure to testify, we cannot conclude that this is a case of "harmless error." The Sixth Circuit used an impermissible "possible-harm" standard. Under the Sixth Circuit's standard, no error will ever be harmless because one can never know what led a jury to its decision and it is always possible that a jury based its decision on the alleged error in question. But that is not the standard under *Brecht*.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz*
Assistant Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5349
susan.lenz@ag.ky.gov

* Counsel of Record

JOINT APPENDIX

Supreme Court, U.S.
FILED
SEP 11 2013
OFFICE OF THE CLERK

No. 12-794

In The
Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

LAURENCE E. KOMP*
ATTORNEY AT LAW
P.O. BOX 1785
MANCHESTER, MISSOURI 63011
(636) 207-7330
lekomp@swbell.net

DENNIS J. BURKE
ASSISTANT PUBLIC ADVOCATE
KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY
207 PARKER DRIVE, SUITE 1
LAGRANGE, KENTUCKY 40031
Attorneys for Respondent

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY
SUSAN RONCARTI LENZ*
ASSISTANT ATTORNEY GENERAL
IAN G. SONEGO
SPECIAL ASSISTANT ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342
susan.lenz@ag.ky.gov
Attorneys for Petitioner

**Counsel of Record*

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 26, 2012
CERTIORARI GRANTED JUNE 27, 2013

TABLE OF CONTENTS

Page

Relevant Docket Entries for the U.S. District Court for the Western District of Kentucky at Paducah 1

Relevant Docket Entries for the U.S. Court of Appeals for the Sixth Circuit 3

Indictment 4

Response to Motion for Disclosure (regarding aggravating circumstances to be placed into evidence) 6

Guilty plea colloquy 8

Pre-trial discussion regarding instructing jury on aggravating circumstances 20

Guilty plea colloquy excerpt read to jury 23

Carter instruction tendered by Woodall 31

Colloquy regarding Woodall's right to testify and discussion of tendered *Carter* instruction 32

Jury instructions 40

Closing argument by prosecutor 49

Closing argument by Woodall 67

Judgment of Conviction and Sentence of Death 78

TABLE OF CONTENTS – Continued

Page

The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Opinion, U.S. Court of Appeals for the Sixth Circuit 1a-29a

Opinion, U.S. District Court 30a-173a

Magistrate Judge's Report and Recommendation, U.S. District Court 174a-258a

Opinion, Kentucky Supreme Court 259a-312a

Order, U.S. Court of Appeals for the Sixth Circuit 313a

Judgment, U.S. Court of Appeals for the Sixth Circuit 314a-315a

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF KENTUCKY AT PADUCAH CIVIL DOCKET FOR CASE #: 5:06-CV-00216-TBR

Date Filed	No.	Document
9/06/2007	15	NOT SCANNED – state court records. (2 boxes rec'd in Paducah on 9/7/07) (KJS) (Entered: 09/07/2007)
		[Relevant state court record items include the following:]
		Transcript of Record
		Transcript of Evidence
		Indictment
		Response to Motion for Disclosure (regarding aggravating circumstances to be placed into evidence)
		Guilty plea colloquy
		Pre-trial discussion regarding instructing jury on aggravating circumstances
		Guilty plea colloquy excerpt read to jury
		Carter instruction tendered by Woodall
		Colloquy regarding Woodall's right to testify and discussion of tendered *Carter* instruction

		Jury instructions
		Closing argument by prosecutor
		Closing argument by Woodall
		Judgment of Conviction and Sentence of Death
		Opinion, Kentucky Supreme Court
01/30/2008	22	REPORT AND RECOMMENDATIONS by Magistrate Judge W. David King on 1/29/08; re *6* Petition for Writ of Habeas Corpus filed by Robert Keith Woodall Objections due by 2/19/2008. (Attachments: #*1* Proposed Order (objections), #*2* Proposed Order (no objections))cc:counsel (KJS) (Entered: 01/30/2008)
02/24/2009	41	OPINION & ORDER adopting *22* Report and Recommendations; Applicaton [sic] for a writ of habeas corpus DN *1* is granted in part and denied with prejudice in part; remanding to the state trial court for further proceedings; see order for specifics. Signed by Chief Judge Thomas B. Russell on 2/23/09. cc:counsel (KJS) (Entered: 02/24/2009)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Court of Appeals Docket #: 99-5406

07/12/2012	N/A*	OPINION and JUDGMENT filed: The judgment of the district court is AFFIRMED and the case is REMANDED with instructions to conditionally grant the writ unless the State of Kentucky elects to initiate resentencing proceedings within 180 days of the district court's order. Decision for publication pursuant to local rule 206. Boyce F. Martin, Jr. (AUTHORING). Deborah L. Cook (DISSENTING), and Richard Allen Griffin, Circuit Judges [09-5352, 09-5406] (CL)
10/03/2012	N/A	ORDER filed denying petition for en banc rehearing [*4665316-2*] filed by Ms. Susan Roncarti Lenz. Boyce F. Martin, Jr., Deborah L. Cook, and Richard Allen Griffin, Circuit Judges. [09-5352, 09-5406] (BLH)

* The U.S. Court of Appeals for the Sixth Circuit does not number record entries.

AOC-320 Rev. 8-91 Commonwealth of Kentucky Court of Justice RCr 6.06, 6.08, 6.10	[SEAL] INDICTMENT	Indictment No. 97-CR-00035 County MULHENBERG Circuit Court Division _____

(Filed Mar. 18, 1997)

COMMONWEALTH OF KENTUCKY,

v.

KRS: 507.020
509.040
510.040

ROBERT KEITH WOODALL, DEFENDANT

The Grand Jury charges: That on or about the 25th day of January, 1997, in Muhlenberg County, Kentucky, the above-named defendant(s):

COUNT 1: committed the capital offense of murder by cutting Sarah Hansen with a sharp object and drowning her;

COUNT 2: committed the capital offense of kidnapping Sarah Hansen in which she was not released alive;

COUNT 3: committed first-degree rape by engaging in sexual intercourse with Sarah Hansen through the use of forcible compulsion in which she received serious physical injury;

Against the peace and dignity of the Commonwealth of Kentucky.

/s/ Paul G. Moore
Foreman

Presented by the foreman of the grand jury to the court, in the presence of the grand jury, and received from the court by me and filed in open court this 18th day of March, 1997.

/s/ Janet [Illegible] Clerk

BAIL $_____ ARRAIGNMENT:_____, 19__ at _____a.m./p.m.

Defendant's date of birth_____ Social Security #_____

The following appeared before the grand jury as witnesses:

Mike Drake
Dr. Mark LeVaughn
Terry Lohrey
Donna Harrison
Matthew Clements
Sylvester Johnson
Mark Johnson
Brian Turner
Catherine Tarrants
Amanda Daugherty
Barbara Woodall
Angie Phelps

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Criminal Action Number 97-CR-00053
(On Change of Venue
from Muhlenberg County)

COMMONWEALTH
OF KENTUCKY, PLAINTIFF,

VS: RESPONSE TO
MOTION FOR DISCLOSURE

ROBERT KEITH WOODALL, DEFENDANT.

(Filed Dec. 18, 1997)

Comes now the Commonwealth of Kentucky, by and through the Commonwealth's Attorney, and for response to the defendant's motion for disclosure of KRS 532.025(1) evidence, states as follows.

That in the event of the conviction of the defendant, the Commonwealth at the hearing following same, pursuant to KRS 532.025 hereby gives notice of intention to instroduce [sic] the following evidence in aggravation of punishment:

(a) The Commonwealth would rely upon the statutory aggravating circumstances set forth in KRS 532.025(2)2, being that the offense of murder was committed while the defendant was engaged in the commission of rape in the first degree; and the offense of kidnapping was committed while the defendant was engaged in the commission of rape in the first degree.

(b) Any and all prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, including the offense of first-degree sexual abuse, two counts, by judgment of the Muhlenberg Circuit Court entered March 2, 1993.

(c) The Commonwealth would rely upon and may introduce at said hearing any evidence introduced at the guilt phase of this trial.

(d) The Commonwealth would reserve the right to introduce any evidence as may be deemed appropriate in rebuttal of any mitigating circumstances presented by the defendant.

/s/ Ralph D. Vick

Ralph D. Vick
Commonwealth's Attorney
110 East Court Square
P. O. Box 349
Greenville, Kentucky 42345

[Certificate Of Service Omitted In Printing]

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Indictment No. 97-CR-00053

COMMONWEALTH
OF KENTUCKY, PLAINTIFF,

VS.

TRANSCRIPT OF EVIDENCE
Volume 3
[Pages 405-417]

ROBERT KEITH WOODALL, DEFENDANT.

APPEARANCES

Attorneys for the Commonwealth:

Hon. Ralph Vick
Hon. John Atkins

Attorneys for the Defendant:

Hon. Jill Giordano
Hon. Mark Baker
Hon. Michael Williams

[April 10, 1998]

Pamela R. Faughn
OFFICIAL COURT REPORTER
56TH JUDICIAL CIRCUIT
109 CHRISTOPHER ROAD
FREDONIA, KENTUCKY 42411
(502) 545-3215

---

* * *

[405] (The action of Commonwealth of Kentucky versus Robert Keith Woodall came on for guilty

plea on April 10, 1998, before the Hon Bill Cunningham, Judge of the Caldwell Circuit Court.

The Commonwealth was represented by Hon. Ralph D. Vick. The defendant was present and represented by Hon. Michael L. Williams and Hon. Mark Baker.

[406] Following is a transcript of said guilty plea proceeding.)

* * *

THE COURT: The Court calls Caldwell Circuit Court, Indictment Number 97-CR-00053, Commonwealth versus Robert Keith Woodall on change of venue out of Muhlenberg Circuit Court. Let the record reflect that the defendant is present in Court along with his attorneys, Mr. Mike Williams and Mr. Mark Baker. The Commonwealth is represented by the Commonwealth Attorney, Mr. Ralph Vick. Okay, Mr. Woodall, would you and your counsel please come around. We need for you to step back so that the reporter can – put the reporter between me and you and make sure that the reporter is able to hear both of us. Mr. Woodall on the 18th day of March of 1997, the Muhlenberg County Grand Jury returned an indictment against you charging you with three counts of felonies. One committed is the capital offense of murder, two, charging you with the capital offense of kidnapping, also thirdly, a first degree rape was the third count. You subsequent to that entered a not guilty plea to that – those charges. However, today the Court has been handed a motion to enter a guilty

plea, [407] and I understand it is a conditional plea, and I'll ask you – it looks like it's been signed by you. I'll ask you is that your signature?

DEFENDANT: Yes sir.

THE COURT: Okay. Mr. Williams, I understand that the defendant is wishing to enter a conditional plea. Is that correct?

MR. WILLIAMS: That's correct, Judge. The – after discussing with Mr. Woodall the evidence which the Commonwealth has provided to us through discovery, which included statements of witnesses, forensic testing, results of that forensic testing, and the fact that my client has, according to motions and hearings that we've had as late as April 3rd of this year, we allege certain conditions or disorders that impact upon several things, not the least of which, uh, lack of memory about facts surrounding the commission of this crime as he alleges to me or as he tells me. Based on all of those and the Court's denial of a continuance in order that we might proceed to obtain that evaluation so that we could prove what could have been an affirmative defense or at least, the very least, statutory mitigation evidence or statutory mitigator, Judge, for those reasons we [408] are moving to enter a conditional plea. My client has been advised what that means. If the Court wishes, I can repeat what I've advised him or – with the Court.

THE COURT: That's okay. I'll go over that with him, and the conditional plea being that the defendant is pleading guilty to these counts on condition

that he be allowed to appeal for appellate ruling the issues that have been raised of record to this date. Is that correct?

MR. WILLIAMS: That's correct, Judge.

THE COURT: Okay. Would you raise your right hand, please? Do you swear or affirm the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

DEFENDANT: Yes sir.

ROBERT KEITH WOODALL: After being first duly sworn, testified as follows:

EXAMINATION BY JUDGE CUNNINGHAM:

Q. State your name for the record, please.

A. Robert Keith Woodall

Q. And Mr. Woodall, what's your date of birth?

[409] A. [Omitted In Printing].

Q. And subject to the – excuse me. Let me ask you this. How much education do you have?

A. I finished the 11th grade.

Q. You can lower your hand. Subject to the pretrial motions filed in this case, have you ever suffered from a mental disease or defect or do you now suffer from a mental disease or defect?

A. Not that I know of.

Q. And have you talked with Mr. Williams about this guilty plea?

A. Yes sir.

Q. Have you had all the time you need to to talk to him about it?

A. Yes sir.

Q. Do you have any complaints about the legal advice given to you by Mr. Williams and Mr. Baker?

A. No sir.

Q. Are you fully satisfied with the job they've done for you?

A. Yes sir.

Q. Did you read and understand this motion to enter a guilty plea before you signed it?

A. Yes sir.

Q. And did you sign it voluntarily of your own free [410] will and accord?

A. Yes sir.

Q. Do you understand, Mr. Woodall, what facts the Commonwealth would have to prove beyond a reasonable doubt for you to be convicted on these offenses?

A. Yes sir.

Q. And did you on or about January 25th, 1997, in Muhlenberg County commit the capital offense of murder by cutting Sarah Hansen with a sharp object and drowning her, and this murder was committed while engaged in the offense of rape in the first degree?

A. Yes sir.

Q. And did you on January 25th, 1997, in Muhlenberg County, Kentucky, commit the capital offense of kidnapping Sarah Hansen in which she was not released alive?

A. Yes sir.

Q. And did you on January 25th, 1997, in Muhlenberg County, Kentucky, commit the offense of first degree rape by engaging in sexual intercourse with Sarah Hansen through the use of forcible compulsion in which she received serious physical injury and death?

A. Yes sir.

Q. Do you understand, Mr. Woodall, you have the following rights? You have the right to a trial by jury in which the Commonwealth has to prove these facts beyond a [411] reasonable doubt. Do you understand that?

A. Yes sir.

Q. Do you understand you have the right during that trial to cross examine and confront witnesses that might be called to testify against you?

A. Yes sir.

Q. You have a right to compel the attendance of witnesses you might want to be brought in to testify in your behalf. Do you understand you have that right?

A. Yes sir.

Q. You have a right to have a lawyer appointed for you not only at the trial, as you have had in this case, but also on appeal if you're convicted. Do you understand you have that right?

A. Yes sir.

Q. More importantly, do you understand you have a right against self-incrimination, which means that you don't have to say anything and that the Commonwealth would have to prove your guilt beyond a reasonable doubt?

A. Yes sir.

Q. Do you understand you have that right?

A. Yes sir.

Q. Do you understand you waive or give up all those rights by pleading guilty?

A. Yes sir.

[412] Q. And do you understand furthermore in this case, Mr. Woodall, what the penalty range is that could be imposed upon you for these offenses?

A. Yes sir.

Q. Do you understand that based upon your plea that sentence could be set upon this case upon this indictment on two of the offenses at least a penalty range of from twenty years to life, the other option would be life without the benefit of parole for 25 years or straight life, and fourthly, the death penalty could be imposed based upon your guilty plea. Do you understand that?

A. Yes sir.

Q. And you've discussed this with your attorney and understand these – this range and the fact that the death penalty is an option in this case. Do you understand that?

A. Yes sir.

Q. And you've discussed that with your attorney?

A. Yes sir.

THE COURT: Do you understand also that – it's my understanding that, Mr. Williams, that the defendant is going to waive a jury trial not only for the purpose of this guilty plea, but also for sentencing. Is that correct?

MR. WILLIAMS: That's correct, Judge.

THE COURT: It's my understanding that the [413] Commonwealth is also waiving a jury trial and both sides are asking for the sentencing hearing

and the sentence to be imposed by the Court. Is that right, Mr. Vick?

MR. VICK: That is correct, your honor.

Q. Okay, Mr. Woodall, let me go into that a little bit. Do you understand that even though you have pled guilty to these offenses and the range of penalty includes death and also includes other penalties, twenty years to life, life without parole for 25 years, and straight life, that you'd also have a right to have a jury trial to be empaneled and to consider the sentencing and impose the sentence. Do you understand that?

A. Yes sir.

Q. Do you understand that during that jury trial, and I'm sure your counsel has gone over this with you, there would have to be – you'd have an opportunity to present evidence in extenuation, and you'd also have – the jury would be required to find certain aggravating circumstances beyond a reasonable doubt and – before they would set that sentence. Do you understand that?

A. Yes sir.

Q. And do you understand that the jury would have to be unanimous in making that determination?

A. Yes sir.

[414] Q. Has your attorney gone over with you and discussed the ramifications and various options in having a jury to set your sentence in this case?

A. Yes sir.

Q. And in light of that fact, do you still wish to waive and have the sentence hearing held by the Court and the Court impose the sentence in this case?

A. Yes sir.

THE COURT: And Mr. Williams, you have advised him of those options and he has chosen to waive a jury trial. Is that correct?

MR. WILLIAMS: That's correct, Judge.

Q. Okay, Mr. Woodall, based upon these rights that I've given to you, is it still your desire to waive these rights, to include the right to a jury trial, not only at the guilt or innocence stage but also the penalty stage, and go ahead and enter this plea to these offenses knowing what the full range of penalties are and which includes a maximum penalty of death and waive also your jury trial for purpose of sentencing and enter your plea to this – these charges this afternoon?

A. Yes sir.

Q. And do you plead guilty freely, voluntarily, of your own free will and accord?

A. Yes sir.

[415] Q. Has anybody for the Commonwealth or otherwise made you any offers of reward or anything to cause you to want to plead guilty?

A. No sir.

Q. Anybody done anything to try to coerce or force you to plead guilty?

A. No sir.

Q. Do you plead guilty voluntarily, intelligently, of your own free will and accord?

A. Yes sir.

Q. Knowing these rights that the Court has given to you, is it still your desire to waive or give up those rights and go ahead and enter this plea of guilty to count – one count of murder while in the commission of rape in the first degree, a capital offense of kidnapping when the victim was not released alive, and for rape in the first degree, and want to go ahead and enter a plea to those three counts?

A. Yes sir.

THE COURT: Mr. Williams, have you discussed this case, and I'm sure you have, fully with Mr. Woodall?

MR. WILLIAMS: Yes, Judge, I have to the extent that I've been able to.

THE COURT: Do you feel like he understands his rights and the nature of these proceedings?

[416] MR. WILLIAMS: He understands his rights and the nature of these proceedings.

THE COURT: Is his plea consistent with your advice and based upon your consultations with him, do you believe it's made voluntarily, intelligently, of his own free will and accord?

MR. WILLIAMS: Yes, Judge, I believe so.

THE COURT: Okay, Mr. Woodall, I find based upon what you have told the Court this afternoon and also based upon an evaluation done by the Kentucky Correctional Psychiatric Unit, K.C.P.C., which is made a part of the record, that you are competent to enter this plea, that you understand these rights I've gone over to you, you understand the ramifications of these rights, and your plea – you knowingly waive those rights, and your plea of guilty is made voluntarily of your own free will and accord. The Court is hereby going to accept your plea of guilty and hereby adjudge you guilty to Count 1 of the indictment, the capital offense of murder while engaged in the commission of rape in the first degree, two or Count 2, the capital offense of kidnapping Sarah Hansen without releasing her alive, and three, I adjudge you guilty of rape in the first degree. The Court is [417] going to postpone the sentencing until we conduct a sentencing hearing, which will commence at 9:00 o'clock on Tuesday morning. The defendant will be remanded to the custody of the jailer. Thank you.

* * *

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Indictment No. 97-CR-00053

COMMONWEALTH
OF KENTUCKY, PLAINTIFF,

VS.

ROBERT KEITH WOODALL, DEFENDANT.

TRANSCRIPT OF EVIDENCE
Volume 4
[Pages 552-554]

APPEARANCES

Attorneys for the Commonwealth:
Hon. Ralph Vick
Hon. John Atkins

Attorneys for the Defendant:
Hon. Jill Giordano
Hon. Mark Baker
Hon. Michael Williams

[July 13, 1998]

Pamela R. Faughn
OFFICIAL COURT REPORTER
56TH JUDICIAL CIRCUIT
109 CHRISTOPHER ROAD
FREDONIA, KENTUCKY 42411
(502) 545-3215

---

* * *

[552] THE COURT: What about the aggravators here? I'm going to throw out some things for

ya'll to give me your input. I think I may have raised this at the last hearing. The defendant has pled guilty to the aggravators. Of course, generally speaking [553] in the sentencing stage, the proof of an aggravating circumstance beyond a reasonable doubt is submitted to the jury. Do each of you think that's still a jury question?

MR. VICK: Judge, I've looked at that and made some calls just trying to make sure we're on the – do this one time. My understanding is that while at the penalty phase I would be permitted I think – I'm not trying to answer with a question, but I would be able to present his guilty plea and obviously all that, but I think at that juncture that leaves us the same as though a jury had just completed in the guilt phase of the trial, and if the jury had found him guilty of the three charges, I think it would still be incumbent and require to put the aggravating circumstances in the instructions, because I think the 532.025 even requires the foreman or foreperson to sign and specify which aggravator or aggravators that they are relying upon. So I believe and I think – Ms. Giordano and I have discussed this, and I think we are probably in agreement that it would be necessary, while it's certainly admissible for this jury to let them know, I think they still have to go through and should be instructed on that.

[554] MS. GIORDANO: Well, it's hard to believe, Judge, but Mr. Vick's right. I think we agree upon the issue.

THE COURT: Okay. Well, I'm going to do it that way.

MR. VICK: Okay.

THE COURT: I have a deep-seated fear about doing it that way, but I don't know any way around it. Because juries do strange things, but anyway, it's conceivable they could go out and find – failure to find beyond a reasonable doubt: aggravating circumstances, even though the defendant has admitted it, but I agree. I think that probably the safest measure would be to go ahead and present it like you would if it was a regular jury trial.

* * *

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Indictment No. 97-CR-00053

COMMONWEALTH
OF KENTUCKY, PLAINTIFF,

VS.

TRANSCRIPT OF EVIDENCE
Volume 10
[Pages 1332-1338]

ROBERT KEITH WOODALL, DEFENDANT.

APPEARANCES

Attorneys for the Commonwealth:
Hon. Ralph Vick
Hon. John Atkins

Attorneys for the Defendant:
Hon. Jill Giordano
Hon. Mark Baker
Hon. Michael Williams

[July 16, 1998]

Pamela R. Faughn
OFFICIAL COURT REPORTER
56TH JUDICIAL CIRCUIT
109 CHRISTOPHER ROAD
FREDONIA, KENTUCKY 42411
(502) 545-3215

---

* * *

[1332] MR. VICK: If it please the Court, at this time we would like to read in the record a portion

of the transcript of the proceedings in this Court on April 10th of 1998.

MS. GIORDANO: We have.

THE COURT: Do ya'll need an instruction from the Court on this so they know what they're getting?

MR. VICK: If you would, your honor, I would appreciate that.

MS. GIORDANO: Oh, sure.

THE COURT: Okay, ladies and gentlemen, I advised you – go ahead and – let me go ahead and swear you, Mr. Atkins.

(Witness sworn to read the transcript of the guilty plea proceeding.)

THE COURT: Before you begin testifying, let me advise the jury about what they are about to receive so they'll understand what's going on here. [1333] You remember, ladies and gentlemen, early yesterday morning – it may seem like two weeks ago now, but I advised you that on the 10th day of April, 1998, the defendant, Robert Keith Woodall, appeared in Court and entered a guilty plea to these charges, and we went over those in our voir dire. On April the 10th, 1998, as is in all criminal proceedings the Court Reporter takes down and transcribes everything that's said and done. What Mr. Atkins and what the Commonwealth is proposing to have read to you now is the transcript of the proceedings of that guilty

plea. So that's what you'll be hearing, uh, Mr. Atkins reading I think that there will be statements from the Court, statements from Mr. Woodall, and also perhaps statements from his attorneys, portions of which the lawyers have agreed upon as to what will be read. Is that correct?

MS. GIORDANO: That's correct, your honor.

MR. VICK: Your honor, just for the record, I believe I will be reading the Court's statements, and Mr. Atkins will be reading the defendant's statements, and we did not include any further language in this.

THE COURT: Alright.

[1334] MR. VICK: And we would like the record to reflect that at the commencement of this proceeding that Robert Keith Woodall was upon first being duly sworn, and he testified as follows.

(The following portion of the guilty plea proceeding on April 10, 1998, was read into evidence. Mr. Vick read the Court's statements, and Mr. Atkins read the defendant's statements. Said guilty plea transcript has previously been filed and is part of the Court record.)

"*ROBERT KEITH WOODALL*: After being first duly sworn, testified as follows:

EXAMINATION BY JUDGE CUNNINGHAM:

Q. State your name for the record, please.

A. Robert Keith Woodall.

Q. And Mr. Woodall, what's your date of birth?

A. [Omitted In Printing].

Q. And subject to the – excuse me. Let me ask you this. How much education do you have?

A. I finished the 11th grade.

Q. You can lower your hand. Subject to the pre-trial motions filed in this case, have you ever suffered from a [1335] mental disease or defect or do you now suffer from a mental disease or defect?

A. Not that I know of.

Q. And have you talked with Mr. Williams about this guilty plea?

A. Yes sir.

Q. Have you had all the time you need to to talk to him about it?

A. Yes sir.

Q. Do you have any complaints about the legal advice given to you by Mr. Williams and Mr. Baker?

A. No sir."

(Reading of transcript interrupted by the Court.)

THE COURT: Let me interrupt here. There may be some confusion. Mr. Williams was Mr. Woodall's attorney at that time or co-counsel. Actually co-counsel. Mr. Williams is a lawyer representing – was co-counsel representing Mr. Woodall, so the jury will understand who Mr. Williams is. Go ahead.

MR. VICK: Thank you, your honor.

(Reading of transcript continued.)

"Q. Are you fully satisfied with the job they've done for you?

[1336] A. Yes sir.

Q. Did you read and understand this motion to enter a guilty plea before you signed it?

A. Yes sir.

Q. And did you sign it voluntarily of your own free will and accord?

A. Yes sir.

Q. Do you understand, Mr. Woodall, what facts the Commonwealth would have to prove beyond a reasonable doubt for you to be convicted on these offenses?

A. Yes sir.

Q. And did you on or about January 25th, 1997, in Muhlenberg County commit the capital offense of

murder by cutting Sarah Hansen with a sharp object and drowning her, and this murder was committed while engaged in the offense of rape in the first degree?

A. Yes sir.

Q. And did you on January 25th, 1997, in Muhlenberg County, Kentucky, commit the capital offense of kidnapping Sarah Hansen in which she was not released alive?

A. Yes sir.

Q. And did you on January 25th, 1997, in Muhlenberg County, Kentucky, commit the offense of first degree rape by engaging in sexual intercourse with Sarah Hansen through the use of forcible compulsion in which she received serious [1337] physical injury and death?

A. Yes sir.

Q. Do you understand, Mr. Woodall, you have the following rights? You have the right to a trial by jury in which the Commonwealth has to prove these facts beyond a reasonable doubt. Do you understand that?

A. Yes sir.

Q. Do you understand you have the right during that trial to cross examine and confront witnesses that might be called to testify against you?

A. Yes sir.

Q. You have a right to compel the attendance of witnesses you might want to be brought in to testify in your behalf. Do you understand you have that right?

A. Yes sir.

Q. You have a right to have a lawyer appointed for you not only at the trial, as you have had in this case, but also on appeal if you're convicted. Do you understand you have that right?

A. Yes sir.

Q. More importantly, do you understand you have a right against self-incrimination, which means that you don't have to say anything and that the Commonwealth would have to prove your guilt beyond a reasonable doubt?

A. Yes sir.

[1338] Q. Do you understand you have that right?

A. Yes sir.

Q. Do you understand you waive or give up all those rights by pleading guilty?

A. Yes sir.

Q. And do you understand furthermore in this case, Mr. Woodall, what the penalty range is that could be imposed upon you for these offenses?

A. Yes sir.

Q. Knowing these rights that the Court has given to you, is it still your desire to waive or give up those rights and go ahead and enter this plea of guilty to count – one count of murder while in the commission of rape in the first degree, a capital offense of kidnapping when the victim was not released alive, and for rape in the first degree, and want to go ahead and enter a plea to those three counts?

A. Yes sir."

(End of reading of guilty plea transcript.)

* * *

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Criminal Action Number 97-CR-00053
(On Change of Venue
from Muhlenberg County)

Instruction No. _____

A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way.

[Tendered and Refused
Tendered by Defendant]

/s/ Jill L. Giordano

Jill L. Giordano

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Indictment No. 97-CR-00053

COMMONWEALTH
OF KENTUCKY, PLAINTIFF,

VS.

ROBERT KEITH WOODALL, DEFENDANT.

TRANSCRIPT OF EVIDENCE
Volume 12
[Pages 1586-1593]

APPEARANCES

Attorneys for the Commonwealth:

Hon. Ralph Vick
Hon. John Atkins

Attorneys for the Defendant:

Hon. Jill Giordano
Hon. Mark Baker
Hon. Michael Williams

[July 20, 1998]

Pamela R. Faughn
OFFICIAL COURT REPORTER
56TH JUDICIAL CIRCUIT
109 CHRISTOPHER ROAD
FREDONIA, KENTUCKY 42411
(502) 545-3215

---

* * *

[1586] (Hearing during lunch recess.)

THE COURT: Any rebuttal, Mr. Vick?

MR. VICK: No, your honor.

THE COURT: And both sides have announced closed? Is that correct?

MS. GIORDANO: Correct, your honor.

THE COURT: The defendant does not wish to take the stand, Ms. Giordano, in his defense?

MS. GIORDANO: No sir.

THE COURT: Do you all wish to put on the record anything in regard to his not taking the stand?

MS. GIORDANO: No sir.

THE COURT: Have you explained to Mr. Woodall his right to take the stand?

MS. GIORDANO: Yes sir.

THE COURT: Do you think he fully understands it?

MS. GIORDANO: Pardon?

THE COURT: Do you think he fully understands it?

MS. GIORDANO: Yes sir.

THE COURT: Mr. Woodall, I'm going to ask you some questions, and I want to make sure that you understand your rights in this regard. You [1587]

understand that – I've gone over this with you before when you entered your guilty plea, but I'll go over it with you again. Do you understand that the penalties in this case, and you've heard us talk about it throughout, includes the death penalty?

DEFENDANT: Yes sir.

THE COURT: And do you understand that you have the absolute right to get on the stand and to testify in this case?

DEFENDANT: Yes sir.

THE COURT: You've already waived your right against self-incrimination by entering a guilty plea to these offenses, and you've already been adjudged guilty of those offenses. You understand that?

DEFENDANT: Yes sir.

THE COURT: So you do not have that to lose by getting on the stand. Do you understand that you'd have the right to get on the stand and testify about anything you wanted to testify to as far as any explanation, expression of remorse, not being able to remember, whatever you would wish to relate to the jury about this offense, ask them for mercy, whatever you would like to relate to them, you have [1588] that right to do so? Do you understand that?

DEFENDANT: Yes sir.

THE COURT: After conference and consultation with your attorneys you have chosen and you chose voluntarily not to testify in this case?

DEFENDANT: Yes sir.

THE COURT: Okay. While we're in here – let's go off the record just a minute.

(Off record discussion.)

THE COURT: Okay, we are reviewing instructions.

MS. GIORDANO: Judge, I don't have a copy of the sentences, the ones that we looked at last week. Are they the same? Have you made any changes?

THE COURT: They're the same except for the adding of the mitigating circumstances. Do you want to look at them?

MS. GIORDANO: Yeah.

THE COURT: I'm going to go ahead and address the other issue –

MS. GIORDANO: Okay, that's fine.

THE COURT: – the tendered instruction. It was on my desk. I guess it's still there. The defendant has tendered an instruction to be given [1589] at this sentencing stage on the defendant's right not to testify, and I'm going to refuse that tendered instruction. It is marked and tendered, and I think I need to state my grounds for the record. I don't think that the Commonwealth objected to it being read. Is that correct?

MR. VICK: That is correct, your honor.

THE COURT: And the Court – it might be a easy way out to go ahead and give it, except, I don't think intellectually honest and I don't think it's in keeping with the case law as far as sentencing is concerned. The Court has the responsibility of not just giving instructions to juries just for the sake of protecting the record and being beyond abundance of caution. It's the responsibility of the Court not only to be a gatekeeper to evidence, but also to be fair on the law. This defendant has waived his right to self-incrimination and has entered pleas to committing the crimes of rape and murder and kidnapping and has asked the jury to set his sentence. The Court is aware of no case law that precludes the jury from considering the defendant's lack of expression of remorse or explanation of the crime or anything else once guilt has been adjudged [1590] in sentencing. In fact, the case that the Court has looked to, the case of Commonwealth versus McIntosh, which is a 646 S.W. 2d 43 case, and the best I can tell from Shepardizing it, the latest statement on this issue, and it was a case where the instruction was not given in the guilt or innocence phase, and the Court – I don't know whether it was the Court of Appeals or the Supreme Court – the Supreme Court of Kentucky said that it was not error where the guilt was overwhelming, and here we have a guilty plea. I just don't think that it's appropriate to instruct the jury that the failure of the defendant to take the stand when he stands convicted

of these very serious crimes is in keeping with the law.

MS. GIORDANO: What was the cite on that?

THE COURT: 646 S.W. 2d 43. Didn't I cite that?

MS. GIORDANO: I think you did. We just didn't –

THE COURT: Okay. Anyway, do ya'll want to add anything on that in support of that instruction?

MR. BAKER: We'd just like to read the case if it's – while we're doing this.

[1591] THE COURT: It's pretty short.

MR. BAKER: Yeah, that's what I noticed.

THE COURT: And after you read it if you want to come back and put something on the record, we'll let you do so. Let's go off the record a minute.

(Off record discussion.)

THE COURT: This is their response.

MR. BAKER: Judge, just having read that one page decision, the case seems to me to read that it certainly is error, but they might not reverse you on that seems to be the holding on that, but it does hold it's error. It just is it – in that case are they going to hold it large enough error to reverse on. So we would

read that – or I would read that as the Supreme Court saying that it's error not to give that instruction, and that would be the controlling case law, and that we were therefore entitled to it.

THE COURT: There's no question I'd give it if we were talking about guilt or innocence. In the sentencing stage to me it defies logic, it defies common sense, it's not intellectually honest to tell this jury – I'm not trying to convince you all – I'm just trying to make the record clear – to tell this jury, the Court of law telling – this [1592] is the law of Kentucky that you can go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that. I just don't think it's logical, so that's why I'm not going to give it.

MR. BAKER: Historically, I think you have the right not to testify because of the certain deficits you have vis-a-vis the Commonwealth. You don't have the access to police primarily, and that's why you have that right and you don't have to get up there and incriminate yourself, and I think the same thing would apply to penalty. That if there's a reason you have that constitutional right not to testify, it would be all the more so in a death penalty case not to have to get up there.

THE COURT: Well, we'll see, I'm sure.

MR. BAKER: I'm not going to convince you, am I, your honor?

THE COURT: We'll see.

MS. GIORDANO: Okay. We'll be glad to see.

THE COURT: Well, it would be easier for me to give, but I just feel I have a responsibility to the Court –

[1593] MS. GIORDANO: I understand your basis for your ruling, but I just think it's wrong.

THE COURT: – not to – not to give instructions where – that don't make sense. Anyway.

(End of hearing during lunch recess.)

* * *

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Indictment No. 97-CR-00053

COMMONWEALTH
OF KENTUCKY, PLAINTIFF,

VS.

ROBERT KEITH WOODALL, DEFENDANT.

INSTRUCTIONS TO THE JURY

(Filed Jul. 20, 1998)

INSTRUCTIONS ON THE COUNT OF MURDER

INSTRUCTION NO. 1

The Defendant, Robert Keith Woodall, pleaded guilty to the Murder of Sarah Hansen. From the evidence placed before you in this trial, you are acquainted with the facts and circumstances of the crime itself. In considering such evidence that may be unfavorable to the Defendant, you will presume the Defendant innocent of these aggravating circumstance or circumstances unless you believe from the evidence that the aggravating circumstance or circumstances exist beyond a reasonable doubt.

INSTRUCTION NO. 2

In fixing the punishment for the offense of Murder, you shall consider one or both of the following aggravating circumstance or circumstances which you may believe from the evidence beyond a reasonable doubt to be true:

1. That the Defendant's act of killing Sarah Hansen was intentional and committed while he was engaged in the commission of Rape in the First Degree of Sarah Hansen as defined in Instruction No. 3; and/or

2. The Defendant committed the offense of Kidnapping as defined in Instruction No. 3, while he was engaged in the commission of Rape in the First Degree as defined in Instruction No. 3.

INSTRUCTION NO. 3

DEFINITIONS:

1. Rape in the First Degree – The Defendant committed Rape in the First Degree if on January 25, 1997, he engaged in sexual intercourse with Sarah Hansen by forcible compulsion, and she received serious physical injury as a consequence of the Defendant's act.

2. Kidnapping – The Defendant committed the crime of Kidnapping if on January 25, 1997, he unlawfully restrained Sarah Hansen with intent to accomplish the commission of Rape in the First

Degree as defined herein, or to inflict bodily injury upon her, or to terrorize her.

INSTRUCTION NO. 4

Mitigating Circumstances

In fixing the sentence of the Defendant for the offense of Murder, you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true including but not limited to such of the following you believe from the evidence to be true:

1. At the time of the offenses committed by the Defendant, the capacity of the Defendant to appreciate the criminality of the requirements of the law was impaired as a result of mental illness or retardation, even though the impairment of the capacity of the Defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime.

2. The youth of the defendant at the time of the crime.

INSTRUCTION NO. 5

AUTHORIZED SENTENCES

You may fix the Defendant's punishment for the Murder of Sarah Hansen at:

1. Confinement in the penitentiary for a term of not less than twenty (20) years or more than 50 years;

2. Confinement in the penitentiary for life;

3. Confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of twenty-five (25) years of his sentence;

4. Confinement in the penitentiary for life without benefit of probation or parole; OR

5. Death.

But you cannot fix the sentence at death, or at confinement in the penitentiary without benefit of probation or parole, or life in the penitentiary without benefit of probation or parole until he has served a minimum of twenty-five years of his sentence, unless you are satisfied from the evidence beyond a reasonable doubt that one or both of the aggravating circumstance or circumstances listed in Instruction No. 2 are true in their entirety, in which event you must state in writing, signed by the Foreperson, that you find the aggravating circumstance or circumstances to be true beyond a reasonable doubt.

INSTRUCTION NO. 6

If you have a reasonable doubt as to the truth or existence of one or both of the aggravating circumstance or circumstances listed in Instruction No. 2 you shall not make any finding with respect to it.

If upon the whole case you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.

INSTRUCTION NO. 7

The verdicts of the jury must be in writing, must be unanimous, and must be signed by one of you as Foreperson.

VERDICT FORM ON THE COUNT OF MURDER

No. 1

We, the jury, fix the Defendant's punishment for the Murder of Sarah Hansen at confinement in the penitentiary for a term of ___ years.

_____

Foreperson

No. 2

We, the jury, fix the Defendant's punishment for the Murder of Sarah Hansen at confinement in the penitentiary for life.

_____

Foreperson

No. 3

We, the jury, find beyond a reasonable doubt that the following aggravating circumstance or circumstances exist in this case. _____

_____

_____

_____

_____

and we fix the Defendant's punishment for the Murder of Sarah Hansen at confinement in the penitentiary for life without benefit of probation or parole until he has served a minimum of twenty-five (25) years of his sentence.

_____

Foreperson

No. 4

We, the jury, find beyond a reasonable doubt that the following aggravating circumstance or circumstances exist in this case. _____

_____

_____

_____

_____

and we fix the Defendant's punishment for the Murder of Sarah Hansen at confinement in the penitentiary for life without benefit of probation or parole.

_____
Foreperson

No. 5

We, the jury, find beyond a reasonable doubt that the following aggravating circumstance or circumstances exists in this case.

That the defendants act of kidnapping and murder was engaged in the commission of Rape in the first degree.

_____

_____

and we fix the Defendant's punishment for the Murder of Sarah Hansen at death.

/s/ Archer L. Hudson
Foreperson

INSTRUCTION NO. 8

The defendant has been found guilty under Count 2 of the indictment of the offense of kidnapping. You shall now fix his punishment for that offense at confinement in the penitentiary for not less than 20 years nor more than 50 years, or for life, in your discretion.

INSTRUCTION NO. 9

The defendant has been found guilty under Count 3 of the indictment of the offense of first-degree rape. You shall now fix his punishment for that offense at confinement in the penitentiary for not less than 20 years nor more than 50 years, or for life, in your discretion.

INSTRUCTION NO. 10

Unanimous verdict:

You must reach a separate verdict for each charge and a separate verdict on your recommendation as to whether the sentences should run consecutively or concurrently. Each verdict must be in writing, must be unanimous, and must be signed by one of you as a foreperson. You may use the forms below in writing your verdict.

VERDICT FORM

1. We, the jury, fix the defendant's punishment under Instruction No. 8, for the offense of kidnapping at ___ years or life (life).

/s/ Archer L. Hudson
Foreperson

2. We, the jury, fix the defendant's punishment under Instruction No. 9, for the offense of first-degree rape at ___ years or life (life).

/s/ Archer L. Hudson
Foreperson

3. We, the jury, recommend that the sentences fixed for the defendant for kidnapping and first-degree rape run consecutively (concurrently or consecutively).

/s/ Archer L. Hudson
Foreperson

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Indictment No. 97-CR-00053

COMMONWEALTH
OF KENTUCKY, PLAINTIFF,

VS.

TRANSCRIPT OF EVIDENCE
Volume 12
[Pages 1601-1623]

ROBERT KEITH WOODALL, DEFENDANT.

APPEARANCES

Attorneys for the Commonwealth:

Hon. Ralph Vick
Hon. John Atkins

Attorneys for the Defendant:

Hon. Jill Giordano
Hon. Mark Baker
Hon. Michael Williams

[July 20, 1998]

Pamela R. Faughn
OFFICIAL COURT REPORTER
56TH JUDICIAL CIRCUIT
109 CHRISTOPHER ROAD
FREDONIA, KENTUCKY 42411
(502) 545-3215

---

* * *

[1601] CLOSING STATEMENT BY MR. VICK:

MR. VICK: May it please the Court?

THE COURT: Mr. Vick.

MR. VICK: Defense counsel.

MS. GIORDANO: Mr. Vick.

MR. VICK: May it please the memory and family of Sarah Hansen. Ladies and gentlemen, six days ago you each raised your right arm in response to Judge Cunningham and you swore to return a true verdict based upon the evidence that would be presented in this case. You have now heard the evidence that's been presented, and you're going to be called upon to give us your verdict. You may remember when I stood before you last time I told [1602] you I felt that the only true punishment in this case was that of the death penalty, and if you'll notice that even though we spent a day and half talking about the various ranges of twenty years to death, immediately on defense counsel telling you what they would be asking, and I assume they still will be back before you asking for life in prison without parole, so that's where the two issues are. That's what I believe you will be considering. Your verdict – simple word, isn't it, your verdict, but your verdict, ladies and gentlemen, is more than just your verdict. You are the representatives of the citizens of Caldwell County. You are the representatives of the citizens of Muhlenberg County. You are the representatives of each citizen in this State. Criminal law is a lot like, I feel,

a contract or an agreement between our various citizens, because we have a large number of people when a criminal trial occurs chosen representatives, jurors are picked, are selected, to hear evidence and return a verdict, and all of us whom you represent rely upon you to do your job, to return in every case and in this case a true verdict. January 25, 1997, Sarah Hansen, 16 years of age, full of life, full of [1603] future, full of pure goodness. She simply went to the store to rent a video. She didn't know – no one knew that sexual predator was on the hunt, was on the prowl that night. Evil walked the streets of Greenville. I would like to just briefly go through the instructions – over one instruction with you at this time and we'll discuss, and if anyone is taking or has an opportunity to write a note, I would just simply would ask them to write down the following statement for me, because these instructions are numerous, but they're – once we get through them, they're not that complicated. The only punishment that can be imposed in this case without a finding of aggravating circumstances would be the punishment of a term of years or simple life, because as the Court will show you and you've seen, verdicts 3, 4, and 5 require the foreperson or juror to write in certain findings, and I certainly will just ask whoever is writing this language down if they would, I would appreciate it, to include the language that the defendant committed murder and kidnapping during commission of first degree rape. I'm not good at dictating, but that's the facts and that's what I wanted to ask that you write down so we get the [1604] language right if you so

find. Now, aggravating circumstances – and before we get to that, let's talk about the three crimes and elements that we have here. We have the crime of murder, and we have the crime of kidnapping, and we have a crime of first degree rape. We all know they're crimes. Everyone in this room knows they're crimes, and everyone in this room knows who committed these crimes, and sometimes my fear or concern is that in a trial we start using the words like kidnapping, rape, and murder, kidnapping, rape, and murder, and they kind of run together, but they're very separate crimes. They're very different type crimes, and I think the horror and terror of all of it is just putting them all in one. If you talk about a murder, ladies and gentlemen, you're talking a life is taken very simply. You add on to that that someone is kidnapped. That's a totally different concept and you talk about taking somewhere, the horror of that, the terror that. You talk, about being abducted. A stranger abduction is what we're talking about. And then in addition to those two separate ends, we end up also talking about a first degree rape, sexual intercourse involving a serious physical injury, [1605] and her serious physical injury is that of death. So sometimes these words run off our – roll off our tongues. Think about each separate independent act that comprised this night of horror and this night of terror for which we stand here before you today. Now, I think at this point what we need to discuss are the basic facts of this case, and I'm not going to get back and parade and present to you each and every item of evidence that you've seen. I don't think

that's necessary. I hope and trust that within the past six days, five days, that you retain and you remember, and there are certain things I may show you, but at this point all I'm asking you to do is just to kind of reflect back with the testimony, the evidence that you've heard. You'll remember we started out with the testimony of Kyle Lovell, Sarah's boyfriend. They were going to watch a movie and we know that, and we know that Kyle went out looking for her that night and couldn't find her. We know that. We also know that Kyle – that Sarah didn't know the defendant. This again was a stranger abduction. Then when did this story really start? Did it start then? Let's back up. What else have we heard? To our knowledge the story starts, this particular story [1606] starts that afternoon when the defendant's girlfriend is going to have a night out. Mr. Armour, you'll recall, overheard a part of a conversation by the defendant talking that his girlfriend was going to be out, and the defendant said, "Well, I'm not going to stay home by myself." I submit to you that the plan formated [sic], began at that point in time. That's probably when he first put a box cutter in his pocket. Who carries box cutters? Further evidence of this plan continuing would have been at the Minit Mart itself at around a few minutes before 8:00 o'clock that night sitting in the booth with Sylvester Johnson. He's a little upset, a little irritated, a little mad because his girlfriend was out on the town without – a girlfriend's night out. He was mad. Remember what else Mr. Johnson told us about. When in walked an individual by the name of Angie Phelps, what did he

say that makes you think what's going on in his mind at that time? "I'd like to have a piece of that." That's what he said, and within ten minutes, within a time frame of just a very few minutes, Sarah comes walking in the door to get a tape, and she did. Now, you heard from the officer, Detective Drake told us this was the [1607] place, this was where the van was, this was where it was found and what it looked like the next morning. You notice it's hung up. You notice the ditch. You see the blood on the door. How did this happen? I think we can almost go back through the testimony and tell – track the defendant, what he did. How he obtained possession of Sarah, we don't know whether he hid in the back seat or he jumped in on her. We don't know. That would be sheer speculation. But we do know, ladies and gentlemen, from talking with Dr. Mark Levaughn, we do know that Sarah was beat and abused and bruised all over. She was struck, bruised, cut, hurt from her feet to the top of her head. We know that she was taken to Luzerne Lake, a desolate, deserted area, and then we know that her clothing was forcibly removed from her body, that her clothing here was found in the back seat of the car, the van seat. We know the clothing was underneath the jacket, the school jacket, and we know – Donna Harrison told us how it was taken out and repositioned with her shorts, her panties, and her bluejeans removed at one time. We also know that her tennis shoes weren't untied. You saw her bra, the bra of little Sarah Hansen that was removed [1608] with such force from her body that the metal wire was straightened. A 16 year old, young girl's bra ripped with such

violence and force that the eyelet is straightened. But the horror and terror didn't stop there, did it? That was just the beginning. What do we know what happened next from Larry Ayres? We know this nude little 16 year old girl, her throat was slashed three and a half inches, not once, not twice, with such force that her windpipe was completely severed. We also know that her neck where the cut was was forced up against the back of this seat. We also know that the void from being placed in this spot is the reason why there's no blood here and here. There's only one position that a human being could be placed in to make the contact there with her arms and the contact there with her neck, and you'll see the pictures of her knees, but it still didn't end, did it? That night was not over for Sarah. She then was able to get to the front seat with her throat cut twice, and she got in the driver's seat. She wasn't there for a minute, and what did she try to do and what did she do? She operated this vehicle. You heard Larry Ayres tell us how someone operated. There was blood all over the gear shift, the ignition [1609] switch, there's blood all over the steering wheel. She drove it to try to get away. And then you heard from Mr. Ayres about the blood that was underneath the driver's seat that was slung up against the fire wall, because she was frantically trying – she was being pulled and taken out from the driver's seat. She still was alive. She still was alive. I told you at the beginning that the evidence will show that little Sarah Hansen didn't die quickly and she didn't die easily, and I think we've shown you. I don't think there's any doubt when you

see the blood and the pools of blood in the video showed you of this ditch, of the blood along the side, and then the trail of blood. Hundreds of feet she was taken, completely disrobed, her throat slashed, being beaten all over, and then she's taken, and then she's drug. She's dragged across the pier and she's dragged across the pier by a person wearing Rawlings tennis shoes, and she is placed into the icy waters of Luzerne Lake, and only then did she drown. And you know something else about her, Kyle told you she was full of life and an active girl, and I'm not going to show you the picture of the one that shows that she was in the water, but I ask you to look at [1610] it, so you'll see something in there. She drowned, but you'll see a leg and arm resting on a pier trying to stay afloat. She didn't die quick. She wanted life. She was full of life, and it was taken. Taken by a 22, almost 23 year old sexual predator, a man who had been to prison for two five year sentences and is released from the penitentiary and out within five years and has murdered – kidnapped, raped, and murdered Sarah Hansen, four and a half years from the date he goes to prison. You know, we also heard – and we wouldn't even get to tell, you wouldn't even get to hear about, except for the fact his aunt says, "Well, of course, he molested my two daughters, too." This man at the age of 23 has sexually molested four young girls, and he's kidnapped, raped, and murdered Sarah. When does it stop? Now, the evidence that you heard concerning Donna Harrison – she told us about the blood that was tested throughout to be Sarah's. She told you how they processed the evidence. You

heard from Terry Lohrey, the fingerprints, the one in blood on the handle of the door, and the fingerprints in dirt around the outside. We also heard from Lucy Davis on DNA. Lucy Davis told us and showed us how the [1611] blood on the box cutter – the blood on this box cutter is that of Sarah Hansen. She also told us that the blood on the tennis shoes – excuse me – the blood on the bluejeans of the defendant is that of Sarah Hansen, and the blood on the sweatshirt that the defendant was wearing that night was that of Sarah's, and the semen, the sperm found in the body of Sarah Hansen was that of the defendant's. Do you remember the mathematical probability she told us about the semen and the blood on the sweatshirt? One in – one in the United States of America, and he's sitting right there today. Now, let me point out something to you that I don't think – you've heard on and on how the defendant has pled guilty. Well, ladies and gentlemen, don't think that I asked him to plead guilty. Don't think that I care if he pled guilty or not. So why did he plead guilty? We've got somebody here through attorneys, through counsel, who has received a copy of each and every report that we had. It's called an open file. They got what we got. They got copies of all the evidence, all the reports, the DNA, the fingerprints. They got everything. Now, you heard the testimony – when did this happen? Was this on January the 27th of [1612] 1997? Of course not. The defendant stood in this Court on April 10th of 1998 and pled guilty so that defense counsel can say, –

MR. BAKER: Objection, your honor.

THE COURT: Overruled.

MR. VICK: – "Keith has pled guilty. He's admitted he's done wrong, so we're not here for that", and while we're talking about other defense strategies, –

MR. BAKER: Judge, I'm going to object to him testifying to what defense counsel thinks or knows.

THE COURT: Overruled.

MR. VICK: Thank you, your honor. You've heard everyone talk – everyone talk about their observations of the defendant. How many of those have told you that he's got a habit of sitting around looking down like this for a week at a time? Don't be fooled. Don't be fooled by that. That's not the defendant, Robert Keith Woodall. The defendant, Robert Keith Woodall is the man that put this instrument in his pocket, his sweatshirt, went stalking at the Minit Mart, grabbed Sarah Hansen, took her out, raped her, cut her throat, drug her down the road, and put her in a lake. That's Robert Keith Woodall by his own admissions. Now, [1613] the aggravating circumstances are two, and there's another one I want you to consider as far as a factor in assessing punishment in this case. The aggravating circumstances said and the Court read to you "in fixing the punishment for the offense of murder you shall consider one or both of the following aggravating circumstances which you may believe from the evidence beyond a reasonable doubt to be true: One, that the defendant's act of

killing Sarah Hansen was intentional and committed while he was engaged in the commission of rape in the first degree of Sarah Hansen as defined in Instruction Number Three", and the definition of rape is fairly simple, and it's right there. Now, can we find that aggravating circumstance is here? Well, absolutely. Not only has it been proven by the evidence in this case, we've got the admission, the sworn testimony of the defendant to this Court on April 10th of 1998, which was read to you. "Do you admit committing the intentional murder of Sarah Hansen while in the commission of first degree rape?" "Yes, I do." You heard it. Aggravating factor number two: "Committed the offense of kidnapping as defined in Instruction Number 3, while engaged in commission of rape in [1614] the first degree." Well, obviously. It's all of what he's admitted to and said. When you talk kidnapping and you're – the definition of kidnapping, if I can find it. "The defendant committed the crime of kidnapping if on January 25, 1997, he unlawfully restrained Sarah Hansen with the intent to accomplish the commission of rape in the first degree as defined herein or to inflict bodily injury upon her or to terrorize her." Ladies and gentlemen, if you don't find that he unlawfully restrained Sarah Hansen, then you must find that Sarah Hansen voluntarily wanted to go with this man she didn't know. That's the only way you can find. One way or the other. And we know, he did it for the purpose of committing rape. I'm not so sure about the terrorize or to inflict bodily – they're all there. It's not an and, it's or. He did those things. Those are the two statutory aggravaters [sic]

here. Only one is required, but they're both here, and they're both here based upon the evidence and his own testimony, and what other factors should you consider in assessing punishment? A very simple fact. He's done it before. Look what he's done. At the age of 18 and a half, he goes to prison. For what? Sexually [1615] abusing small children. One girl, two counts. Then we find not one girl two counts, three girls no telling how many counts before this. When does it end? What is a true verdict? Mitigating circumstances – let's talk about that a minute. The Court has told you, and it's in there, that the mitigating circumstances are two. Let me take the second one first. For you to consider the youth of the defendant at the time of the crime. At the time of this horrible, evil crime committed by the defendant, he was 22, almost 23 years of age in years, but how old was he in experience. How many 22, almost 23 year old men have been in prison two five year terms and have not even gone to prison for molesting two others? Where does it end? The only other mitigator for you to consider here is if at the time of the offense committed by the defendant he didn't have the capacity, the ability to appreciate the criminality of the requirements of law and was impaired as a result of mental illness or retardation. Well, what do we know about what he was thinking, what his thoughts were that night? We know what he said he was going to do looking back on it. "I'd like to have a piece of that." He puts the box cutter in his pocket. [1616] What was he like afterwards? What did he do? Well, he hid his clothes. He hid his bloody clothes. Not in his apartment, but he

hid them somewhere. We'll never know where. What else did he do? Washed shoes. Why is he washing his shoes on January 27th? You're talking about somebody after he commits this horrible foul act goes back to mom for alibi, and mom alibis for him. What does he do? He sat on the recliner and watched T.V. It's frightening, but it's evil. We heard from several witnesses. We heard from Kim Melton, the teacher, who had taught the second or third grade for ten or eleven years. She had hundreds of students. If you'll recall, I asked her, "Where do you place the defendant? In what range?". She said, "Right in the middle." That's exactly what she said. Her observations as a teacher – right in the middle. You heard the testimony of Jane Dodson, and what did she tell us? She referred him to a learning assistance. Why? Because, and it says in the only school records you'll see here, because of the fact he was shuffled back and forth between schools. You heard the testimony about that he was in – withdrawn in May and put in in May. Well, of course that's not great for an [1617] educational background, but that does not comport – does not equal to a mental incapacity or retardation situation. Dr. Kay Willey, the first one that we heard from that was a doctor, said he did not have any diminished capacity, no diminished capacity. Then we heard from various family members, and all of them told us that it was bad what he'd done, obviously, and they asked you not to return the death penalty but to give him life, to spend the rest of his life behind bars I believe they even said. In our country we allow family and friends to come before jurors and to plea or ask

for mercy. That's just the way it is. But you know, wouldn't it be something if Alan and Julie Hansen had some rights to plead for mercy or just to say, "Can I see her one more time before you kill her? Before you slash her throat, can I hug her? Before you drag her off for thirty minutes of pure horror and evil, let me say bye to her?" And we get to hear about Dakota. How many children will Sarah ever have? I want you to remember that, because every time someone says, "Keith this", it's just got to come to somebody's mind, "Well, what about Sarah? What about Sarah?" Sarah didn't make any of these facts. She's the victim. The man [1618] that made each and every fact is the man that's standing before you today for you to impose the fair punishment, the true verdict. You know, I would say this to – generally to the Woodall family. I understand what they've been through and going through, but don't – we hear first of all from his mom. His mother tells us how maybe things weren't great when he was a child, and you heard all that, but this is the same woman, a mom, who told the police and gave statements that her son couldn't have done it. "He didn't do it. He was with me. From 7:30 to 8:00 o'clock that night, he was with me the whole night." Well, it got proven wrong. It may take a few months for them to see all the evidence, but that got – so that changes. So the point I'm making here is, you don't always hear truth from people that may have a desire to get to accomplish a special purpose. In other words, will someone stretch a story to help out a son, to help out a nephew? Of course they will. Who could go out and refute

anything that happened in the confines of a home? Family? Common sense is what you need to consider and utilize and I know you will, but the one person I don't really make an – Lori Woods told us Keith abused her two [1619] daughters, and that they forgave him. You know, sometimes if people weren't so forgiving, maybe I wouldn't be here right now. Maybe we wouldn't have to hear the horror and maybe, just maybe Sarah Hansen would be among the living. We forgive him? There's one word that we don't ever hear much about anymore, and I think it applies here, and that word is called accountability. Do you excuse or let off or mitigate somebody whose parents had to get married, and then they got divorced? Well, you know, that covers a whole lot of people, but can that be it, because we keep – also we've heard about his brother and sister, two law abiding productive citizens who were raised in the same home. So perhaps the blame shouldn't be shifted somewhere else. I say to you the blame should be placed exactly where it is right now on the defendant for him to accept responsibility and accountability for the horror he's done. The evidence concerning mitigation, mental capacity, and the ability to appreciate the criminality of his act, we heard from several more. We heard from Dr. Johnson. What did Dr. Johnson tell us? Dr. Johnson, the man that had an opportunity to evaluate him for two weeks, who heard the – had [1620] the other reports, told us there was no evidence of any mental retardation, there was no evidence of any major mental illness, and that the defendant was fully capable of appreciating and understanding the criminality of his

act. That's what he said. That's exactly what he said. Now, they're going to come up and try to argue a little b[illegible] addition to why all his looking down, they're going to come back and they're going to say to you, "Well, he had a mental illness. There was some problems." Who can't get fly specked and looked at and say well maybe this person had this problem and – that's not what we're about here. All of us are different people, and this is not an exact science in this field, but your goal, your duty is to make sure that an individual understands and knows what he's doing when he does it and he knows he's not supposed to be doing it. That's it. That's exactly it. Dr. Johnson further gave us the opportunity of some – Dr. Burke, the prison doctor, who found him average when he was in prison last time, and the interesting thing about Dr. Johnson that he told us was remember the element, the condition of impulsiveness, poor judgment. That's the characteristics of people in prison. I [1621] mean should that come as a surprise. That's what he said, and that's the way it is. I mean does that surprise anybody that that's what we're talking about here? I further submit to you that Dr. Spears' statement that the use of slivers of soap to alleviate constipation constitutes sexual abuse, I obviously have great substantial disagreement with. If you can pick out of an isolated event of one – of a parent trying to relieve a situation in a small child, and to turn that into some type of offense, don't let them do it. It's accountability, ladies and gentlemen. It's accountability. You know, this now – we get back – when Lori Woods said to me or said to us, "I asked

him why did you do it?" "I didn't think I was hurting anybody" is what he said. You remember he said that, and I got to thinking there's a book I had in my closet. I just said, "What was the name of that book and what was it it said?" There's something that fit, and there was – John Walsh is the host of America's Most Wanted. I don't know if any of you – he had a son named Adam that was abducted and murdered, and back at that time what he – what he said, he was talking to a pathologist much like Dr. Levaughn, "How can you as [1622] a doctor go look at a body of someone that's been raped and murdered and mutilated? How do you do that?" And what he said just seemed to strike me as being so appropriate and applicable here. If I can find the quote, he said, "I believe that there's such a thing a- true goodness in this world and also that there's true evil. People who don't believe the devil walks this earth have not seen the things I've seen. I've known through experience that there are people out there who believe that they have the right to do whatever they like to whomever they chose. If they want to have sex with a woman or a dog, or to rip, beat, and torture anyone at all, they do. These people are not insane. They're as sane as you and me, but they don't live by the rules of any moral code, at least not one within human society. They are so incredibly selfish that they live only by their own rules, and these people are horribly, horribly evil." Ladies and gentlemen, that's got the ring of truth to me in what I've seen and what we've heard, and I'm going to ask you, and we still keep looking for what is the true verdict. I tell you the true verdict.

The true verdict is that of death, and I say it without hesitation. It's not [1623] an easy thing that we do sometimes, but it is a necessary thing that we do, and if you have any doubt as to Verdict Form Number Five being the death verdict, then I ask you to do me a favor. I want you if you would after you've looked at all this evidence, I want you to look at Commonwealth's Exhibit Number 1. Before or after you vote on what the punishment is in this case, pass it around. Look into those eyes. Say, "Have I done justice? Have I returned the true verdict?" You'll know when you look at this, and that's when you will know you've done the right thing, not the easy thing, but the right thing. On behalf of the Commonwealth of Kentucky, I ask you, I demand, I request that you return a true verdict in this case, the only verdict, and I thank you.

* * *

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Indictment No. 97-CR-00053

COMMONWEALTH
OF KENTUCKY, PLAINTIFF,

VS.

TRANSCRIPT OF EVIDENCE
Volume 12
[Pages 1623-1636]

ROBERT KEITH WOODALL, DEFENDANT.

APPEARANCES

Attorneys for the Commonwealth:

Hon. Ralph Vick
Hon. John Atkins

Attorneys for the Defendant:

Hon. Jill Giordano
Hon. Mark Baker
Hon. Michael Williams

[July 20, 1998]

Pamela R. Faughn
OFFICIAL COURT REPORTER
56TH JUDICIAL CIRCUIT
109 CHRISTOPHER ROAD
FREDONIA, KENTUCKY 42411
(502) 545-3215

---

* * *

[1623] CLOSING STATEMENT BY MS. GIORDANO:

MS. GIORDANO: May it please the Court?

THE COURT: Ms. Giordano.

MS. GIORDANO: Mr. Vick.

[1624] MR. VICK: Ms. Giordano.

MS. GIORDANO: Ladies and gentlemen of the jury. Do we kill Keith Woodall? Do we kill Robert Keith Woodall? Ladies and gentlemen, for the last several days you've been in this courtroom, and you've had the opportunity to observe the attorneys and you've had the opportunity to observe, to look upon Keith Woodall, but I suggest and I assume, ladies and gentlemen, that none of you have ever looked upon another human being with that awesome decision. Do we kill this young man? The Judge has given you the instructions that you're supposed to follow in this case, and he has told you that this is a time for us to make arguments to you, but I'm going to take these minutes, ladies and gentlemen, to kind of think out loud about this case, and to think a little bit about how you decide between the two most severe, most extraordinary punishments that our Courts have given us, death or life in prison without the possibility of parole, and life not as we know it, life in a little bitty cell about the size of your bathroom. Every day when Keith comes over here he's unchained, and every day when he leaves, he's chained up again, and that is life in prison [1625] without the possibility of parole. That is what his life is now, what his life will be. Ladies and gentlemen, if you remember when we began this trial, this time together, I told you you would hear nothing good. I

told you about oceans of tragedy, oceans of sadness, and that's what it has been. There has not been a happy moment during this trial. There has not been any, and I told you there wouldn't be, and I also told you that when you left here, as when you came here, when this was over, he would be guilty of those crimes of which he has pled guilty, the rape, and the kidnapping, and the murder of Sarah Hansen, and Mr. Vick can speculate as to why he came into this Court and he said, "I'm guilty of those things", but he came in and said, "I'm guilty", because he is guilty. He told you that. He has told this Court that, and that's why he pled to those things, and you have heard about the life of Sarah Hansen, about what a wonderful young woman she is, what a joy she was to her family, what a joy she was to her community. You've heard all those things, and it brings upon more sadness than I'm sure her family can imagine, and the grief her family feels and the grief and the sadness that her community feels will probably [1626] never stop. Regardless of what we do, it will probably never stop. And we're here to decide the punishment that Keith should get for the horrible criminal thing that he did, and Judge Cunningham has talked to you about aggravating circumstances, and Mr. Vick has talked to you about aggravating circumstances, and I said before, and I will tell you again, he did those things. We've not denied that. We've not offered a defense to that. He did those things. But ladies and gentlemen, when we decide how to punish someone, yes, we look at what they did. Most certainly we look at what he did, and you've had the opportunity to do

that, but we consider who they are. I have two sons. One is one and one is eight, and I don't punish them the same, because they may do something that's alike. They both know where I keep the cookies, and they both, even my one year old now knows how to go over and find a cookie, but I punish my eight year old different than I punish my one year old, and that's what we do. We consider these things. Mr. Vick has asked you to consider those, and you have the right to consider the things that he did, but you look at who he is, and you consider who he is, and when you make this decision, and it's your [1627] decision, each of you have the right to make the individual decision, you consider who he is. We've all heard about the Supreme Court, and ladies and gentlemen, today you are the Supreme Court when you make that decision. Each of you makes that decision. Each one of you will decide whether or not Keith will spend the rest of his life in prison or whether or not he will die. And I want to talk a little bit about perhaps how you make that decision, but before I do that, I want to talk to you a little bit about what this case is not about. It's not about excusing what Keith Woodall did, because there is no excuse for it. It's not about justification, because there is no justifying what he did to Sarah Hansen, and ladies and gentlemen, it's not about forgiveness. We're not asking for forgiveness, because we don't have the power to forgive him for what he's done. We don't have that power. But what it is about to a certain extent is about the debt that we owe our parents and the obligation we owe our children. Those of you who have children love and nurture your

children, because you know it makes a difference. That's why we do the things we do for our children. We know it makes a difference, and it's not fair for any [1628] child to come into this world without those expectations that we have, that I have for my children, that my parents had for me, the love and the warmth, and we know from what the experts have told us that when Keith was born, he was born with a lower intellectual functioning. He was born with that. He was damaged to a certain extent, and we know he was born into a family where he had no father to speak of and a mother so wracked with depression that she couldn't mother. We know those things about Keith, and none of us would ever want our children to be brought into a home that way or to think about our children in those circumstances, and fortunately for Keith, sure, he had a loving second family, a family that looked after him, tried to take care of him, but I'm not sure that that could overcome the suffering and the tragedy in his life. This is about Keith Woodall and about the things that you consider about him. It's about the little boy who struggled with a problem with his bowels from the time he was infant for many years, many years, even into adulthood. It's about the child who having had that problem as an infant was treated with slivers of soap, and you've heard Dr. Spears say that's abuse, that's sexual abuse, [1629] and none of us would want our children to go through that. You heard about all those school years that he had that problem, and the teachers that sent him home with feces in his pants he didn't even know that he had. The family members who knew

that he had this problem but couldn't get him to understand it, this little boy who always, always had this problem with stench, because apparently he didn't even understand that he had the problem, and none of us would want that for our children. You've learned about the filth that he lived in, the bugs, and the mice, the home that sometimes didn't have heat and sometimes didn't have water. You heard about those things, and none of us would want those things for our children or want to bring our children into a home like that, and you've heard about the little boy who week after week after week sat on the front porch with his suitcase packed waiting for his dad to come and pick him up until the day would grow long, and he would be told to come inside that his dad wasn't coming. You heard about the problems he had in school. No, he wasn't the worst student. At those early ages, he wasn't the worst student. He had this other horrible problem, the bowel problem, [1630] along with the problem he was having in school, but you heard about how he was shuffled from home to home, from school to school, and it wasn't until he was nearly an 18 year old tenth grader that someone said, "There's a problem here", and he was referred for the first time to get help. And ladies and gentlemen, Mr. Vick has referred to Keith as "evil, just evil, some people are just plain evil", but I ask you, do you think you could have walked in during this boy's life as he was growing up and see him in those conditions and said, "Boy, he's just plain evil. He's just plain evil." I don't think so. And do we excuse him for what he's done because of all of these things? Of course not.

It's not an excuse. We do not excuse him because of these things, but do we consider it? Absolutely. And ladies and gentlemen, we consider it because you promised me that you would consider it. You promised that you would consider those things about him and his lifetime before you went back in that jury room to make this decision about the choice between these two extraordinary punishments, these most severe punishments, life in prison for the rest of his life or death. You promised you would do that. What to most of us is [1631] the thought that we have when we think about a mother? She's warm, she's love, she's nurturing, all of those good thoughts that come to mind. But to Keith Woodall a mother was simply the person who brought him into this world. There's so much depression in her life, she couldn't mother him. When we think about a father, what do we think about? I think about a rock, someone who has all the answers to those questions that I don't know the answer to. Keith Woodall, his father was at the bottom of a bottle, and he waited for him on that porch week after week after week. We've talked about today, as a matter of fact, Keith's low intellectual functioning and mental illness that he has. You've heard not only Dr. Spears talk about that, but Mr. Vick's witness, Dr. Johnson, talked about those things that he suffers from, and you heard about the testimony. Mr. Vick referred to some of these about some of the characteristics of that illness, of that intellectual functioning, and how it makes that person different from you and I. And all of these things that we've talked about, some more subtle

than others, are again things about a person we want to know. When Mr. Vick said, "You know, we've heard all these things [1632] about him, but there was three of them. What about his sister? What about his brother? They turned out alright." Ladies and gentlemen, we talked about that a little bit about how Keith was treated somewhat differently from his brother and sister, and most of you probably know the parable about the sower of seeds, and that some of the seeds were sown among the rocks and they didn't grow, some were sown among the thistle and it wasn't easy, but struggled and they were able to produce, and the seed that was sown on good ground produced a hundred fold, and I believe that if you look at Keith in that respect, his seed was certainly cast among the thistle, and yes, some of the people are able to make it if you're strong and you're smart. Some people in those circumstances certainly rise above it, but he's not smart, he's imperfect, he's flawed. He lacked a support system. He was uprooted and moved about. He lacked those things that would give you the ability – give that seed the ability to rise through that thistle. There are good things you've heard about Keith. You recall the testimony of his teachers, and well, really everyone that came forward in the last couple of days to talk about him. No one ever said [1633] anything about Keith being evil. He always did what he was told. He was good in class. He never got into a fight, never caused a problem, did as he was told. He was a good renter, a good worker. You heard about those good things, and when you consider the punishment, you look at all of those things that Mr. Vick

asked you to look at, and again you look at all these things we've told you about his lifetime and the good things, too, before you make that decision. When you have someone – when you're considering the punishment when you have someone who has been punished for most of his life, you look at the facts and circumstances of his life, and he's been punished most of his life, you consider that as well. Most of you I assume since you were a child may have – or at some point in your life have heard the words from Ecclesiastes. "For every thing there is season and a time for every affair under the heavens. A time to be born, a time to die. A time for war, and a time for piece." And ladies and gentlemen, I don't believe that God called us together today in this place for the purpose of killing another child of God, for killing Keith Woodall. He's called us together to punish him. That's what we're here [1634] for. Mr. Vick has demanded of you that based on Keith's actions over those two hours, two horrible hours some 14 months ago in Muhlenberg County that you make the decision to take his life and return a verdict of death. He says that's the only answer, but that's not what your instructions tell you that that's the only answer. Let the punishment fit the crime? That's not what the instructions say. The instructions say consider all these things. And I'd ask you for a moment to think about it in this way. Those hours back in January of 1997 were truly tragic. We can't take them back, and we can't change them. We can't undo them. We can't make it right. We can't bring Sarah Hansen back. But to judge someone based on just two hours of their life would be like just taking a

snapshot out of time and not considering their life from start to finish. You cannot or should not make a decision about whether to end someone's life based on an hour or a day or a week or even a year. If you were to read a book, ladies and gentlemen, you would not open the book up to the middle and read a few pages and say, "Yes, I understand what that book was about", because if you did that and you believed that, the truth is you really wouldn't [1635] know the whole story. You'd have to read that book from cover to cover, every page, to fully understand what that book was about. That's what we're asking you to do when you consider your punishment for Keith Woodall. I am asking you not to kill Keith Woodall for those few hours in his life where he committed an unexcusable, unforgivable act, and I would not be truthful if I told you that I cannot at least imagine the tragedy and pain of the Hansen family of what they must have experienced, but as we look at Keith Woodall, I ask you to think back on those things that we've talked about, and I would ask you not to kill that child as he lay in his filth and stink in his home and in his feces, and I'd ask you not to kill this child that as he takes his first steps across the room despite any real interest by anyone, a mother or father. I'm asking you not to kill a boy who by the time he was five had an absentee and an alcoholic father, and I'm asking you not to kill this young boy who spent his days in feces. I'm asking you not to kill Keith. I ask you on behalf of Keith, his mother, his son. Mr. Vick has said to you, "When does it stop? When does it end?" Well, it stops now. It ends now. Because you

have [1636] the right, you have the option to put him in prison for the rest of his life without ever having the possibility of parole. It stops now. But ladies and gentlemen, I would remind you that if you were to chose to take the life of Keith, that it would not change anything that has happened. It would not repair anything that has been done. It would not upright the world of the Hansens that has been turned upside-down, and it would not heal, it would not forgive, because only God and only time can accomplish those things. Thank you, ladies and gentlemen.

COMMONWEALTH OF KENTUCKY
CALDWELL CIRCUIT COURT
Indictment No. 97-CR-00053
(On Change of Venue from Muhlenberg County)

COMMONWEALTH
OF KENTUCKY, PLAINTIFF,

VS. **FINAL JUDGMENT OF CONVICTION AND SENTENCE OF DEATH**

ROBERT KEITH WOODALL, DEFENDANT.

(Filed Sep. 4, 1998)

The Defendant entered a plea of guilty on April 10, 1998, to the following charges: Count 1, the capital offense of murder of Sarah Hansen by cutting her with a sharp object and drowning her while in the commission of rape in the first degree; Count 2, the capital offense of kidnaping Sarah Hansen when she was not released alive; and Count 3, the offense of rape in the first degree by engaging in sexual intercourse with Sarah Hansen through the use of forcible compulsion in which she received serious physical injury and death.

A sentencing jury having been duly empaneled and sworn to hear evidence and affix punishment did on July 20, 1998, return a verdict of death as to Count 1 of the indictment, finding that aggravating circumstances exist, to-wit: That the Defendant's act of kidnaping and murder was engaged in the commission of rape in the first degree.

Thereupon, also the jury returned a punishment on rape in the first degree at life and on kidnaping at life. The Court did schedule sentencing regarding the final sentence for capital murder as well as sentencing for kidnaping and rape in the first degree for September 4, 1998, at 2:00 p.m.

On this date, September 4, 1998, the Defendant, Robert Keith Woodall, appeared in open Court with his attorneys; and the Court inquired of the Defendant and of counsel whether they had any legal cause why judgment should not be pronounced against him and afforded the Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment; and the Court having given due consideration to such statements of counsel and to the nature and circumstances of the crime and the history, character, and condition of the Defendant, and there being no legal cause shown to the contrary, the Court finds the following:

The Defendant is not eligible for probation or probation with alternative sentencing or conditional discharge.

No sufficient cause having been shown why judgment should not be pronounced, **IT IS ORDERED AND ADJUDGED** by the Court that the Defendant is guilty of the following charge: Capital Murder, Count 1, as to the death of Sarah Hansen, KRS 507.020, and is hereby sentenced to death by lethal injection or such other means as may be provided for by law. The

lethal injection shall take place before sunrise on the fifth Friday following the date of the mandate of the Supreme Court of the Commonwealth of Kentucky, if this judgment and sentence be upheld, unless the execution is further stayed by due process of law. Thereafter, the execution shall take place at a time or times designated by the Governor of the Commonwealth of Kentucky, unless again stayed by due process of law.

IT IS FURTHER ORDERED AND ADJUDGED that the Court has reviewed a presentence investigation report in regard to the sentence on the kidnaping and the rape in the first degree and finds the Defendant is not eligible for probation on these charges. Therefore, the Defendant is sentenced to life imprisonment on the kidnaping and life imprisonment on the rape.

By virtue of law, each of these sentences along with the death penalty must run concurrent.

IT IS FURTHER ORDERED AND DIRECTED that the Defendant shall forthwith be delivered to the custody of the Department of Corrections by delivering him to the Kentucky State Penitentiary, Eddyville, Kentucky.

After imposition of sentence, the Court informed the Defendant that his conviction and sentence of death would be automatically reviewed by the Kentucky Supreme Court. The Court further advised the Defendant that he had the right to file an appeal within ten (10) days from the Court Order from the

bench and that upon filing of this Judgment and Sentence by the Clerk of the Caldwell Circuit Court, the Clerk shall file an automatic Notice of Appeal on behalf of the Defendant.

The Court finds that the Defendant lacks funds with which to obtain counsel and orders that the Department of Public Advocacy continue to represent the Defendant and take necessary steps to perfect the Defendant's appeal. The Court further orders that a copy of the transcript of the trial be made available to counsel for the Defendant to assist in perfecting the appeal.

Pursuant to the provisions of RCr 11.22, the Clerk of the Caldwell Circuit Court shall cause a certified copy of this Judgment to be served upon the Defendant and his counsel, and a certified copy shall also be served upon the Warden of the Kentucky State Penitentiary at Eddyville, Kentucky, where the Defendant is now being held.

WITNESS MY HAND this 4th day of September, 1998.

/s/ Bill Cunningham
Bill Cunningham
Circuit Judge

CLERK'S CERTIFICATE

[Omitted In Printing]

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-794

Supreme Court, U.S.
FILED
SEP 11 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

JACK CONWAY
ATTORNEY GENERAL
OF KENTUCKY
SUSAN RONCARTI LENZ*
ASSISTANT ATTORNEY GENERAL
IAN G. SONEGO
SPECIAL ASSISTANT
ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342
susan.lenz@ag.ky.gov
Attorneys for Petitioner

**Counsel of Record*

September 11, 2013

Library of Congress
Law Library

CAPITAL CASE
QUESTIONS PRESENTED

Robert Keith Woodall, amidst overwhelming evidence of his guilt, pleaded guilty to kidnapping, raping, and murdering a 16-year-old child, and thus pleaded guilty to all aggravating circumstances. At the penalty phase trial, the prosecutor elected to present evidence of guilt and the circumstances of the crimes. Woodall did not testify; his request that the jury be instructed not to draw any adverse inference from his decision not to testify (a no-adverse-inference instruction) was denied. He was sentenced to death by a Kentucky jury. The Kentucky Supreme Court affirmed.

Even though this Court has never held that a defendant is entitled to a no-adverse-inference instruction at the sentencing phase of a trial where the defendant has pleaded guilty to all offenses and all aggravating circumstances, the Sixth Circuit determined that the Kentucky Supreme Court unreasonably applied this Court's holdings from three cases in violation of Woodall's Fifth Amendment right against self-incrimination. The questions presented are:

1. Whether the Sixth Circuit, violated 28 U.S.C. §2254(d)(1) by granting habeas relief on the trial court's failure to provide a no-adverse-inference instruction even though this Court has not "clearly established" that such an instruction is required in a capital penalty phase when a non-testifying defendant has pleaded guilty to the crimes and aggravating circumstances.

CAPITAL CASE

QUESTIONS PRESENTED – Continued

2. Whether the Sixth Circuit violated the harmless error standard in *Brecht v. Abrahamson,* 507 U.S. 619 (1993), in ruling that the absence of a no-adverse-inference instruction was not harmless in spite of overwhelming evidence of guilt and in the face of a guilty plea to the crimes and aggravators.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Trial Court Proceedings	2
1. Woodall's Guilty Plea to Murder, Kidnapping, and Rape	2
2. Penalty Phase Trial Evidence	4
a. Evidence from Prosecution Witnesses	4
b. Evidence from Woodall's Witnesses	7
3. Discussion Regarding *Carter* Instruction	9
4. The Verdict	10
B. Direct Appeal Ruling	10
C. Federal Habeas Corpus Rulings	13
1. Magistrate Judge's Report	13
2. United States District Court	14
3. United States Court of Appeals for the Sixth Circuit	14

TABLE OF CONTENTS – Continued

Page

SUMMARY OF ARGUMENT 17

ARGUMENT 21

I. The Sixth Circuit violated 28 U.S.C. §2254(d) when it granted habeas relief in the absence of clearly established Federal law, as determined by this Court, and when it second-guessed the reasonable decision of the Kentucky Supreme Court 21

A. There is no clearly established Federal law, as determined by this Court, regarding whether a *Carter* instruction is required in the penalty phase of a trial after a defendant has pleaded guilty to the crimes and all aggravating circumstances 22

1. *Carter*, *Estelle*, and *Mitchell* established rules regarding a defendant's silence that do not extend beyond the finding of facts "respecting the circumstances and details of the crime" that, if found, increase the sentencing range 23

2. *Carter*, *Estelle*, and *Mitchell* do not clearly establish a constitutional right to a no-adverse-inference instruction during a penalty phase proceeding that follows a defendant's plea of guilty to the crimes and all aggravating circumstances 30

TABLE OF CONTENTS – Continued

Page

3. Woodall's arguments about Kentucky law do not bring him within the purview of *Mitchell* 33

4. The absence of clearly established law defeats Woodall's claim for habeas relief 37

5. At the very least, no clearly established law required the trial court to give the specific instruction proposed by Woodall 40

B. The Kentucky Supreme Court's decision was not "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" 41

II. Even if there were error, it was harmless under the *Brecht v. Abrahamson* "substantial and injurious effect" standard 43

A. Trial error is harmless unless it had substantial and injurious effect or influence in determining the jury's verdict 43

B. The absence of a *Carter* instruction in this case did not have substantial and injurious effect on the jury's verdict 44

C. The Sixth Circuit erred when it engaged in speculation and possible-harm review 46

CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES

Alleyne v. United States, 133 S.Ct. 2151 (2013)....32, 33
Berghuis v. Smith, 559 U.S. 314 (2010).....31
Brecht v. Abrahamson, 507 U.S. 619 (1993).....*passim*
Calderon v. Coleman, 525 U.S. 141 (1998).....44
Carey v. Musladin, 549 U.S. 70 (2006).....31, 38, 39
Carter v. Kentucky, 450 U.S. 288 (1981).....*passim*
Delo v. Lashley, 507 U.S. 272 (1993).....34, 35
Estelle v. Smith, 451 U.S. 454 (1981).....*passim*
Estelle v. Williams, 425 U.S. 501 (1976).....38, 39
Flamer v. Delaware, 68 F.3d 736 (3rd Cir. 1995).....34
Griffin v. California, 380 U.S. 609 (1965).....*passim*
Harrington v. Richter, 131 S.Ct. 770 (2011).....22, 43
Herrera v. Collins, 506 U.S. 390 (1993).....35
Holbrook v. Flynn, 475 U.S. 560 (1986).....38, 39
Illinois v. Lidster, 540 U.S. 419 (2004).....27
Kansas v. Marsh, 548 U.S. 163 (2006).....34
Kentucky v. Whorton, 441 U.S. 786 (1979).....35
Knowles v. Mirzayance, 556 U.S. 111 (2009).....39, 42
Kotteakos v. United States, 328 U.S. 750 (1946).....43
Lockyer v. Andrade, 538 U.S. 63 (2003).....42
Lowenfield v. Phelps, 484 U.S. 231 (1988).....34

TABLE OF AUTHORITIES – Continued

Page

Meese v. Commonwealth, 348 S.W.3d 627 (Ky. 2011) 36

Mitchell v. United States, 526 U.S. 314 (1999) ... *passim*

Nevada v. Jackson, 133 S.Ct. 1990 (2013) 39

O'Neal v. McAninch, 513 U.S. 432 (1995) 44

Panetti v. Quarterman, 551 U.S. 930 (2007) 42

Penry v. Johnson, 532 U.S. 782 (2001) 31

Portuondo v. Agard, 529 U.S. 61 (2000) 30

Sawyer v. Whitley, 505 U.S. 333 (1992) 42

Skaggs v. Commonwealth, 694 S.W.2d 672 (Ky. 1985) 36

Strickland v. Washington, 466 U.S. 668 (1984) 42

Thaler v. Haynes, 559 U.S. 43 (2010) 31

Thompson v. Commonwealth, 147 S.W.3d 22 (Ky. 2004) 34

Tuilaepa v. California, 512 U.S. 967 (1994) 34

United States v. Cronic, 466 U.S. 648 (1984) 39

United States v. Rubin, 609 F.2d 51 (2d Cir. 1979) 26

Williams v. Taylor, 529 U.S. 362 (2000) 41

Wright v. Van Patten, 552 U.S. 120 (2008) 38, 39

Yarborough v. Alvarado, 541 U.S. 652 (2004) 41

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... *passim*

FEDERAL STATUTES

28 U.S.C. §2254(d)(1) ..... *passim*

KENTUCKY CRIMINAL STATUTES

KRS 532.025 ..... 3, 34, 35, 36

OPINIONS BELOW

The opinion of the Sixth Circuit (Pet. App. 1a-29a) is reported at 685 F.3d 574. The opinion of the district court (Pet. App. 30a-173a) is unreported, but can be found at 2009 WL 464939. The opinion of the magistrate judge (Pet. App. 174a-258a) is unreported, but can be found at 2008 WL 5666261. The opinion of the Kentucky Supreme Court (Pet. App. 259a-312a) is reported at 63 S.W.3d 104.

STATEMENT OF JURISDICTION

The Sixth Circuit entered its judgment on July 12, 2012. Pet. App. 314a-315a. A petition for rehearing *en banc* was denied on October 3, 2012. Pet. App. 313a. This court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Sixth Circuit granted Petitioner's motion to stay issuance of the mandate pending review by this court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

> "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."

28 U.S.C. §2254(d)(1)

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Trial Court Proceedings

1. Woodall's Guilty Plea to Murder, Kidnapping, and Rape

On January 25, 1997, in Muhlenberg County, Kentucky, Robert Keith Woodall kidnapped 16-year-old Sarah Hansen, slashed her throat twice, raped her, and threw her in a nearby ice cold lake to drown. As a result, he was indicted for murder, kidnapping, and rape. Facing overwhelming evidence of his guilt, Woodall opted to plead guilty to all of the charged crimes for which he was accused, including the aggravating circumstances. J.A. 12-13.

During the plea colloquy, Woodall told the court he was not aware of ever having suffered from a

mental disease or defect, that he was satisfied with the job his lawyers had done, and that he had read and understood his motion to enter a guilty plea. Woodall understood what facts the Commonwealth would have to prove beyond a reasonable doubt in order to convict him on each of the offenses. J.A. 11-12. And Woodall admitted the following: he had committed the capital offense of murder by cutting Sarah Hansen with a sharp object and drowning her, while engaged in the offense of first-degree rape; he had committed the capital offense of kidnapping Sarah Hansen and not releasing her alive; and he committed first-degree rape by engaging in sexual intercourse with Sarah Hansen through the use of forcible compulsion in which she received serious physical injury and death.[1] J.A. 13. He also understood, *inter alia*, he had a right against self-incrimination which meant he did not have to say anything and the Commonwealth would have to prove his guilt beyond a reasonable doubt. He understood he was giving up those rights by pleading guilty. J.A. 14.

---

[1] *See* Kentucky Revised Statute (KRS) 532.025(2)(a)2 (capital sentencing statute), which states in relevant part, the following aggravating circumstances: "The offense of murder or kidnapping was committed while the offender was engaged in the commission of . . . rape in the first degree . . . ."

2. Penalty Phase Trial Evidence

a. Evidence from Prosecution Witnesses

The prosecution witnesses testified as follows: At the time of her death, Sarah Hansen was a high school cheerleader, an honor student, an "incredible trumpet player," a member of both the National Honor Society and the Beta Club, and a medalist in swimming and diving. 9 T.E. 1192.[2]

On the night of her murder, Sarah had planned to watch a video with her family and her boyfriend. She drove the family mini-van to the local Minit Mart to rent a movie. Just before she left her home, her mother walked her to the door, saying, "Bye-bye, I love you." Sarah's mother never saw her alive again. 10 T.E. 1341.

Woodall was in the Minit Mart around the same time as Sarah. 9 T.E. 1197, 1200. He did not know Sarah and had, the year before, gotten out of prison for serving time on a conviction for two counts of sexual abuse; he had also sexually abused two of his cousins. 10 T.E. 1330-1331, 1429-1430. Woodall was angry because his girlfriend was out with friends. 9 T.E. 1199. Another girl had walked into the Minit Mart right before Sarah, and Woodall had remarked he would like to "have a piece of that." *Id.* at 1246-1247.

---

[2] References to the trial transcripts of evidence are to the volume and page number, so 9 T.E. 1192 refers to page 1192 of the ninth volume of the Transcript of Evidence.

When Sarah failed to return home after a few hours, her family called the police. The police subsequently found the mini-van Sarah had been driving lodged in a ditch at a lake approximately one mile from the Minit Mart. A large amount of Sarah's blood was in the ditch just under the driver's door and large amounts of her blood were everywhere inside the van, including the driver's seat, steering wheel, gear shift lever and ignition switch. A box cutter with Sarah's blood on it was found near the van. *Id.* at 1206-1209.

A trail of blood led from the van down a gravel road. The bloody trail continued for 400-500 feet before it trickled out. There were then drag marks from that point out to the dock of the lake. The drag marks extended out to the edge of the dock. Sarah's unclothed body was found floating in the water next to the dock. *Id.* at 1210-1211.

Her throat had been deeply slashed twice. Each cut was 3.5 to 4 inches long. In addition to her trachea having been severed (which would have rendered Sarah unable to speak), multiple muscles supporting Sarah's head and neck were also severed. Sarah had multiple bruises and abrasions on her head and face and all over the rest of her body. She had drowned to death. *Id.* at 1221-1225.

During the investigation, the police learned that Woodall had left the Minit Mart a few minutes before Sarah's arrival. *Id.* at 1200. Woodall gave the police conflicting statements about what he had done after work on the night of the murder. *Id.* at 1236-1237. A

bloody tennis shoe print matching Woodall's shoes was found on the pier next to Sarah's body. *Id.* at 1232-1233, 1237-1238. Woodall's fingerprints were found on and in the van. *Id.* at 1240, 1306-1311. Muddy and wet clothing was found under Woodall's bed. Sarah's blood was found on Woodall's jeans and sweatshirt. *Id.* at 1241, 1264. And Woodall's DNA was found on Sarah's vaginal swabs. 10 T.E. 1327-1328.

Prior to the prosecutor calling the last witness, a portion of Woodall's guilty plea colloquy was read to the jury. J.A. 23-30. Specifically, the jury heard that Woodall admitted to committing the capital offense of murder by cutting Sarah Hansen with a sharp object and drowning her, while he was engaged in the offense of first-degree rape; the capital offense of kidnapping Sarah, where she was not released alive; and the offense of first-degree rape by engaging in sexual intercourse with Sarah by the use of forcible compulsion in which she received serious physical injury and death. The jury also heard that Woodall indicated he understood he was giving up certain rights in exchange for pleading guilty, such as the right against self-incrimination and the Commonwealth's obligation to prove his guilt beyond a reasonable doubt. J.A. 27-29. Neither the trial court nor the prosecutor asked the jury to infer anything negative from the fact that Woodall chose not to testify. J.A. 49-66.

b. Evidence from Woodall's Witnesses

Woodall introduced witnesses who testified as follows: Woodall was a quiet, average, well-disciplined student in elementary school. 10 T.E. 1347. He also had a spastic colon and would have to be sent home for accidental bowel movements.[3] *Id.* at 1349, 1412, 1436. By the time Woodall was in the tenth grade, he had become withdrawn and would fall asleep in class. *Id.* at 1358-1359.

Woodall was evaluated in 1991 and found to have no diminished capacity and no emotional or neurological problems. *Id.* at 1370-1376. Woodall's full scale IQ was 74; he was not mentally retarded. 11 T.E. 1501, 1511, 1554. Woodall was an overachiever in some categories and an underachiever in other categories. *Id.* at 1512. His IQ of 74 allowed the school to classify him as "educably mentally handicapped." This designation entitled him to special support to help him reach functional, adult-levels skills in subjects such as reading and writing. *Id.* at 1505-1506.

Woodall was also evaluated at the Kentucky Correctional Psychiatric Center in 1998 and found to have

---

[3] Woodall's grandmother would put soap into warm water and place it in Woodall's rectum to help with his constipation. 10 T.E. 1412, 1439. Woodall's mother would also cut a sliver of soap to use as a suppository, but would not put it in water before using it on Woodall. *Id.* at 1412-1413. One of Woodall's witnesses, Dr. Gail Spears, who never interviewed Woodall, testified that using soap as a suppository was a form of sexual abuse. 11 T.E. 1564, 1581.

full scale IQ of 78. *Id.* at 1519-1520, 1525-1526. There was no indication of any kind of organic brain impairment. *Id.* at 1530-1531. A review of all of Woodall's subtests did not reveal the presence of any significant strengths or weaknesses. *Id.* at 1526. Woodall's profile suggested a personality disorder not otherwise specified with paranoid and borderline traits, and an adjustment disorder with mixed anxiety and depressed mood. *Id.* at 1539, 1545-1546. He was further diagnosed with having abused marijuana. *Id.* at 1545. His profile described a man who was impulsive, hostile, bitter, and unempathetic. 11 T.E. 1540. Woodall stated, during the course of his mental health interview, that he knew that a person who would take someone hostage, force someone to have sex, or kill someone, would be engaging in illegal criminal activities. *Id.* at 1549.

Woodall's mother's home was dirty; it had roaches and mice. 10 T.E. 1409-1410. Woodall's parents were divorced and Woodall's father was not a good provider. 11 T.E. 1476-1478; 10 T.E. 1435, 1438. They did not always have utilities. 10 T.E. 1410. Woodall, his mother, and his siblings would stay with his grandparents "a whole lot." *Id.* at 1414-1415. Woodall spent a lot of time at his grandparents' house; he wanted to stay with his grandparents and his aunts and uncles. *Id.* at 1437. His grandmother and aunt provided care for him for "a pretty good while." *Id.* at 1417.

Woodall's aunt testified that Woodall sexually abused two of her daughters over a three-year period. *Id.* at 1422. Woodall, however, was never convicted for

abusing these two cousins; he went to prison for molesting someone else. *Id.* at 1430. Woodall's grandmother testified that Woodall had sexually abused three of her grandchildren. *Id.* at 1445. Woodall was terminated from the Sex Offender Treatment Program while in prison due to "excessive unexcused absences." 11 T.E. 1552.

Woodall's mother indicated to the jury that after Woodall abducted Sarah, raped, and murdered her, he went to his mother's house where he fell asleep in a recliner watching television. 10 T.E. 1464-1466.

3. Discussion Regarding *Carter* Instruction

During Woodall's penalty phase trial, after all evidence was presented, the trial court discussed the jury instructions, out of the hearing of the jury, with both the prosecutor and defense counsel.

Defense counsel asked the trial court to instruct the jury as follows: "A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." J.A. 31. The prosecutor did not object. The trial court declined to give the instruction, stating it was aware of no case law that precluded "the jury from considering the defendant's lack of expression of remorse or explanation of the crime or anything else once guilt has been adjudged in sentencing." The trial court further stated it was not logical to tell the jury that the law of Kentucky is "that you can go out and rape and murder and kidnap and admit to it and then offer no

testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that." The trial court never indicated it would use Woodall's silence against him and never told the jury that it could do so. J.A. 35-39.

4. The Verdict

The jury deliberated one hour and eight minutes before sentencing Woodall to death for the murder of Sarah Hansen. 12 T.E. 1638-1640. Specifically, the jury found the following aggravating circumstances to exist: "That the defendant's act of kidnapping and murder was engaged in the commission of rape in the first degree." J.A. 46. The jury deliberated 23 minutes before fixing Woodall's punishment for kidnapping and first degree rape at two consecutive life sentences. 12 T.E. 1646-1647.

B. Direct Appeal Ruling

On direct appeal, Woodall argued that the failure of the trial court to give the penalty phase jury a no-adverse-inference instruction violated his Fifth Amendment right against self-incrimination. He relied on a combination reading of *Carter v. Kentucky*, 450 U.S. 288 (1981), *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999). *Carter* held that, upon request at the close of the guilt phase of a trial, the jury must be instructed that a defendant's failure to testify cannot be used to infer guilt. In *Estelle*, which did not involve any

request for a no-adverse-inference instruction, the Court stated that it "can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." And *Mitchell* held, among other things, that a court may not draw adverse inferences from a defendant's silence when determining contested facts and circumstances about the crime that, by statute, determine the severity of the sentence. The Kentucky Supreme Court carefully considered each case and disagreed that they require a no-adverse-inference instruction during the penalty phase of a trial in which the defendant has pleaded guilty to the crimes and all aggravating circumstances. Pet. App. 261a-263a.

First, the Kentucky Supreme Court noted that the no-adverse-inference instruction contemplated in the guilt phase in *Carter* was used to protect a nontestifying defendant from the appearance of guilt because of a decision not to testify. Given that Woodall had pleaded guilty to all of the charged crimes, as well as the aggravating circumstances, the court explained, "[t]here was no reason or need for the jury to make any additional inferences of guilt." Pet. App. 261a-262a.

The Kentucky Supreme Court then considered *Estelle* and Woodall's argument that *Estelle* extended the Fifth Amendment protection, and thus the *Carter* instruction, to the penalty phase of a trial. The Kentucky Supreme Court noted that *Estelle* was neither a guilty plea case nor a jury instruction case, did not

cite *Carter*, and did not indicate that it was extending *Carter*. *Estelle* involved the use of an unMirandized out-of-court statement the defendant made to a government psychiatric expert. The statement was used against the defendant without warning in the penalty trial. The court noted that Woodall had not contested any of the facts and had not been compelled to testify so as to implicate the Fifth Amendment privilege as in *Estelle*. Pet. App. 262a.

The Kentucky Supreme Court next found that *Mitchell* was distinguishable and did not apply. In *Mitchell*, the defendant pleaded guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine. She reserved the right to contest the amount of the cocaine at her sentencing, which would determine the penalty range. She only admitted to "some of" the charged conduct. A sentencing hearing was held to determine the facts and circumstances surrounding the crimes, during which the sentencing court specifically told Mitchell that it held her silence against her. The Kentucky Supreme Court concluded that *Mitchell* did not govern because it differed from this case in a fundamental way: Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes. Pet. App. 262a-263a.

In the alternative, the Kentucky Supreme Court held that any possible error would be "nonprejudicial" because Woodall had admitted to the crimes and aggravating circumstances and evidence of his guilt was overwhelming. Pet. App. 261a-262a.

One justice dissented, pointing out that while Woodall did not contest any of the facts or aggravating circumstances, he did contest the requested penalty of death. Pet. App. 309a-311a. Another justice joined the dissent on unrelated grounds, but found "failure to give a no adverse inference instruction, if erroneous, harmless because the defendant not only pled guilty, but admitted to the aggravating circumstances." Pet. App. 312a.

C. Federal Habeas Corpus Rulings

1. Magistrate Judge's Report

Woodall filed a habeas corpus petition in the U.S. District Court for the Western District of Kentucky. The district court referred the case to a magistrate judge. The magistrate judge recommended that the district court reject Woodall's claim and concluded that the Kentucky Supreme Court's adjudication of the claim was not contrary to or an unreasonable application of this Court's precedents. Pet. App. 176a-184a.

The magistrate judge noted that Woodall had argued that absent the instruction, the jury may have drawn an improper inference of lack of remorse due to his silence. The magistrate judge pointed out that *Mitchell* specifically stated that the Court expressed no opinion on whether silence bears upon the determination of a lack of remorse or upon acceptance of responsibility. Pet. App. 182a.

2. United States District Court

The U.S. District Court rejected the magistrate's recommendation. It read *Carter, Estelle,* and *Mitchell* together and stated, "[t]here is but one reasonable conclusion that can be reached – a capital defendant has a Fifth Amendment right to a no adverse inference instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement." Pet. App. 58a.

The district court engaged in a harmless error analysis under *Brecht v. Abrahamson,* 507 U.S. 619 (1993), and concluded the alleged error was not harmless because the court could not "say for certain that the jury did not" hold Woodall's failure to testify against him. Pet. App. 61a-63a.

3. United States Court of Appeals for the Sixth Circuit

A divided panel (2-1) of the Sixth Circuit affirmed the judgment of the U.S. District Court. Judge Martin, joined by Judge Griffin, generalized the holdings in *Carter, Estelle,* and *Mitchell,* and concluded that Woodall, who had pleaded guilty to all the charged crimes and aggravating circumstances and did not contest the facts and circumstances of the crimes, was entitled to a no-adverse-inference instruction in the penalty phase of his trial. Pet. App. 4a-9a. The court found that the Kentucky Supreme Court's denial of the claim was an unreasonable application of *Carter*, *Estelle*, and *Mitchell*.

Specifically, the Sixth Circuit found that *Estelle* extended a defendant's entitlement to Fifth Amendment protection to the penalty phase and that *Mitchell* extended Fifth Amendment protection even where a defendant has pleaded guilty. Pet. App. 6a-9a. The court also referred to one of its own cases in finding that Woodall was entitled to a "no adverse inference" instruction. Pet. App. 7a. In support of its ruling, the court said that a state court decision is an unreasonable application of this Court's precedent if the state court unreasonably refuses to extend a legal principle to a new context where it should apply. Furthermore, the court said that clearly established law also includes legal principles and standards enunciated in this Court's decisions. Pet. App. 8a.

The Sixth Circuit then ruled that the error was not harmless. After suggesting that the refusal to give a no-adverse-inference instruction might never be harmless, the majority stated, "[b]ecause we cannot know what led the jury to make the decision that it did, and because the jury may well have based its decision on Woodall's failure to testify, we cannot conclude that this is a case of 'harmless error.'" Pet. App. 11a. The court based its determination, in part, on "grave doubt" that the jury's recommendation was not influenced by adverse inferences drawn from Woodall's decision not to testify. *Id.*

Judge Cook, dissenting, pointed out that neither *Estelle* nor *Mitchell* extended the *Carter* remedy – a right to a no-adverse-inference instruction – to the circumstances presented in this case. Pet. App. 19a.

Both *Estelle* and *Mitchell* involved government or court actions that penalized the defendant by exposing the defendant to greater punishment for exercising the Fifth Amendment privilege; and most importantly, the state did not shift its burden of proving a disputed aggravating factor to Woodall. Pet. App. 21a-22a. In sum, the punitive element so critical in *Estelle* and *Mitchell* – the state's use of the defendant's silence to impose greater punishment – is wholly absent in Woodall's case. Pet. App. 22a.

Judge Cook noted that the state neither sought an adverse inference nor opposed Woodall's request for a *Carter* instruction. In the absence of disputed facts, Woodall's silence would demonstrate only a lack of remorse. "Considering that *Mitchell* expressly exempted lack-of-remorse and acceptance-of-responsibility findings from its holding, 526 U.S. at 330, the state has good reason to believe that the Fifth Amendment did not require a *Carter* instruction here." Pet. App. 22a.

In discussing harmless error, Judge Cook stated, "[t]he majority compounds its error by engaging in a form of *possible*-harm review that verges on a presumption of prejudice. This leniency appears both in its emphasis on dicta opining about the likelihood that juries draw adverse inferences, and in its ultimate finding of a 'very real risk' of prejudice. Alas, the correct harmless-error standard does not permit such

speculation, and neither does the undisputed evidence of this heinous crime." Pet. App. 24.

SUMMARY OF ARGUMENT

I. The Sixth Circuit disregarded the limits Congress imposed in 28 U.S.C. §2254(d)(1) when it granted habeas relief based on its conclusion that a no-adverse-inference instruction is required in the penalty phase of a capital trial where the defendant has pleaded guilty to all crimes and aggravating circumstances – and when it ruled the Kentucky Supreme Court's ruling to the contrary was unreasonable. This Court has never squarely addressed whether a no-adverse-inference instruction is constitutionally required in the penalty phase of a trial, where a non-testifying defendant has pleaded guilty to all the crimes and aggravating circumstances. Section 2254(d)(1) forecloses habeas relief based on a rule this Court has not clearly established; and it forecloses relief when the state court's ruling is not "an error . . . beyond any possibility for fairminded disagreement." Both obstacles foreclosed habeas relief in this case.

The three decisions of this Court to which the Sixth Circuit looked are *Carter v. Kentucky*, 450 U.S. 288 (1981), *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999). In *Carter*, this Court held that when a defendant makes a proper request, the trial court must instruct the jury, in the guilt phase of a trial, that a defendant is

not compelled to testify and the fact that he does not "cannot be used as an inference of guilt and should not prejudice him in any way." The *Carter* instruction helps to protect a non-testifying defendant, in the guilt phase of trial, from an inference of guilt by virtue of his or her silence.

In *Estelle*, which did not involve a guilty plea and which did not mention or extend *Carter*, this Court prohibited the use of the defendant's pre-trial statement, given during a court-ordered mental evaluation obtained in violation of the *Miranda* rule, to establish his eligibility for the death penalty. *Estelle* did not establish any clear rules regarding when no-adverse-inference instructions are required.

Finally, in *Mitchell*, this Court prohibited a sentencing court from using a defendant's failure to testify to infer guilt of a sentencing factor that the prosecutor was required to prove to increase the sentence. The Court pointed out that "[t]he Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." 526 U.S. at 330. The Court would not permit a negative inference to be drawn about Mitchell's guilt with regard to factual determinations respecting the circumstances and details of the crime. The Court left open the question of whether silence bears on the issue of remorse.

Neither *Carter*, *Estelle*, nor *Mitchell* clearly established a rule that requires a no-adverse-inference

instruction during a penalty phase proceeding where the defendant has pleaded guilty to the crime and all aggravating circumstances. *Carter* dealt with proving guilt only; *Estelle* involved using a defendant's unwarned statement against him at sentencing; and *Mitchell* involved a trial court using a defendant's failure to testify to shift or reduce the prosecution's burden of proof regarding facts of the case the government needed to prove for a mandatory minimum sentence to be imposed.

Mitchell therefore differs from this case in multiple important ways: Unlike here, it involved the sentencer actually making an adverse inference based on silence; it involved facts regarding the crime itself; it involved facts as to which the government bore the burden of proof; and it involved facts that, if found, would increase the sentencing range. Those features of the case were critical to the *Mitchell* Court's reasoning, which emphasized that the government cannot meet its burden of proving the facts of the crime by "enlist[ing]" a silent defendant. *Mitchell*'s narrow scope is confirmed by the Court's leaving open whether the jury can take a defendant's silence into account when assessing lack of remorse or acceptance of responsibility. The Court has left open when those adverse inferences may, or may not, be made in a sentencing proceeding. The harm that the *Mitchell* Court sought to address is simply not present in this case. The Sixth Circuit, in finding that a modified *Carter* instruction is required in these circumstances, has created a new rule of constitutional law in violation of §2254(d)(1).

Because *Carter*, *Estelle*, and *Mitchell* do not clearly establish a rule that requires a prophylactic jury instruction in a case such as this, habeas relief is barred under §2254(d)(1). And the Kentucky Supreme Court's refusal to extend *Carter*, *Estelle*, and *Mitchell* to this type of case was not "an error . . . beyond any possibility for fairminded disagreement."

II. Even if the judge should have given a no-adverse-inference instruction, the absence of such an instruction did not have "substantial and injurious effect on the jury's verdict," as required for habeas relief under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In addition to Woodall's admission of guilt of the brutal and senseless crimes, the jury also heard evidence of his prior sexual abuse convictions and the fact, that after he raped the young victim and threw her in the lake to drown, he fell asleep watching television, as if nothing had happened. Given this undisputed overwhelming evidence, there is no reasonable basis to conclude that the absence of a modified *Carter* instruction had a substantial and injurious effect or influence in determining the jury's verdict.

In order to find the alleged error was not harmless, the Sixth Circuit watered down the *Brecht* standard into a possible-harm standard and failed to consider the overwhelming case for the death sentence on the facts presented. The Sixth Circuit stated that it could not conclude that Woodall's case was a case of harmless error "[b]ecause we cannot know what led the jury to make the decision it did, and because the jury may well have based its decision [to

sentence Woodall to death] on Woodall's failure to testify . . . ." The standard used by the Sixth Circuit would, in effect, preclude harmless error in nearly every death penalty case. Under the correct standard, the error here (assuming arguendo there was one) was harmless.

ARGUMENT

I. The Sixth Circuit violated 28 U.S.C. §2254(d) when it granted habeas relief in the absence of clearly established Federal law, as determined by this Court, and when it second-guessed the reasonable decision of the Kentucky Supreme Court.

The Sixth Circuit granted habeas relief based on its conclusion that the Kentucky Supreme Court unreasonably applied rulings of this Court. Specifically, the Sixth Circuit concluded that Woodall had a constitutional right to a no-adverse-inference instruction at the close of his penalty phase trial – a trial held after he pleaded guilty in open court to all the crimes for which he was accused, including aggravating factors. That decision contravened the limits Congress imposed in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Under the "unreasonable application" clause of 28 U.S.C. §2254(d)(1), a federal court can grant habeas relief only if the state court's merits ruling was "an unreasonable application of, clearly established Federal law, as determined by [this Court]." As this

Court recently explained, §2254(d) "is a guard against extreme malfunctions in the state criminal justice systems." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011). Accordingly, to obtain "habeas corpus . . . , a state prisoner must show that the state ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-787 (internal quotation marks and citations omitted).

That showing cannot be made here. As explained below, this Court has not clearly established that a no-adverse-inference instruction is required after the defendant has pleaded guilty to all the facts and circumstances of the crimes, including aggravating circumstances. And the Kentucky Supreme Court's refusal to extend this Court's precedents to create such a right was not "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

A. There is no clearly established Federal law, as determined by this Court, regarding whether a *Carter* instruction is required in the penalty phase of a trial after a defendant has pleaded guilty to the crimes and all aggravating circumstances.

The Sixth Circuit read *Carter*, *Estelle*, and *Mitchell* as collectively creating a rule requiring a modified *Carter* instruction in the penalty phase when a defendant has pleaded guilty to all crimes and aggravating

circumstances and the specifics of the crimes and aggravating circumstances are uncontested. Those cases do no such thing. Each of the cases dealt with far different circumstances than this case and was premised on reasoning that does not necessarily extend to this context.

Woodall did not merely ask the Kentucky courts to apply a general rule to a new fact pattern; he asked the court to create a new rule regarding when courts must provide no-adverse-inference instructions. But AEDPA authorizes habeas relief based only on a state court's failure to reasonably apply "clearly established" law as determined by *this* Court. Woodall's request for habeas relief must therefore fail.

1. *Carter*, *Estelle*, and *Mitchell* established rules regarding a defendant's silence that do not extend beyond the finding of facts "respecting the circumstances and details of the crime" that, if found, increase the sentencing range.

Carter v. Kentucky. The no-adverse-inference rule was established in *Griffin v. California*, 380 U.S. 609, 614-615 (1965). In *Griffin*, the Court held that a prosecutor or judge cannot tell the jury that it may draw an adverse inference of guilt based on a defendant's failure to testify during the guilt-innocence phase of a trial. In that case, the trial judge instructed the jury that it may "take that failure [to testify] into consideration as tending to indicate the truth of [the

State's] evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." *Id.* at 610. The Court found that such an instruction violates the Fifth Amendment right against self-incrimination by penalizing a defendant for exercising that right. *Id.* at 614.

The Court extended *Griffin* in *Carter v. Kentucky*, 450 U.S. 288 (1981), by holding that upon a defendant's request, the trial court must instruct the jury that it may not draw an inference of guilt from the defendant's failure to testify. *Carter* explained that the penalty exacted in *Griffin* by adverse comment on the defendant's silence "may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt." *Id.* at 301.

Carter clearly establishes a right to a no-adverse-inference instruction during the guilt-innocence phase of a trial only. Unlike this case, *Carter* did not involve a guilty plea. Carter contested his guilt, did not testify, and then asked the trial court to instruct the jury that he "is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." *Id.* at 294.[4]

---

[4] The prosecutor, during the guilt phase, commented on Carter's silence by remarking that if there were a reasonable explanation why Carter had run when he saw the police, it was "not in the record." *Id.*

Carter did not address whether a no-adverse-inference instruction is required during the sentencing phase of a trial, let alone where the defendant has pleaded guilty to all aggravating facts that bear on the sentencing range.

Estelle v. Smith. In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court held that Smith's Fifth Amendment privilege against self-incrimination was violated when the prosecutor, during a capital penalty phase, used *Miranda*-violative statements Smith made during a court-ordered psychiatric examination to prove his future dangerousness (one of three findings which required the jury to impose the death penalty in Texas).

During the penalty phase of Smith's trial, the prosecution called a state-appointed psychiatrist to testify regarding Smith's future dangerousness. The court had earlier ordered Smith to meet with the psychiatrist; and he was not warned that his statements to the psychiatrist could be used against him. Smith did not testify during the penalty phase. Based on Smith's account of the crime during the interview, the doctor testified that Smith was a severe sociopath, that he would continue his previous behavior, that his sociopathic condition would get worse, that he had no regard for property or life, that there was no treatment to modify his behavior, that he would commit similar crimes if given the opportunity, and that he had no remorse. In other words, the doctor testified to Smith's future dangerousness. *Id.* at 464. Texas was required to prove future dangerousness

beyond a reasonable doubt and used Smith's own statements to do so. *Id.* at 466.

The Court found that the essence of the Fifth Amendment was "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Id.* at 462 (emphasis in original). "To meet its burden, the State used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty. In these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated." *Id.* at 466.

The rule clearly established by *Estelle* is that a defendant's Fifth Amendment rights are violated when the state tries to meet its burden of proving a defendant is death-eligible by using against him unwarned statements he made to a psychiatrist pursuant to a court order. The Court also stated (in response to the state's contention that "incrimination is complete once guilt has been adjudicated") that it could "discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." *Id.* at 462-463. That statement is *dicta* to the extent it bears on any issue beyond what was before the Court. *See United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to

the issue that is before him; . . . ."); *see also Illinois v. Lidster*, 540 U.S. 419, 424 (2004) ("We must read this and related general language in [the Court's prior opinion] as we often read general language in judicial opinions – as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering."). And the circumstances when a no-adverse-inference instruction is required are well beyond what was before the Court in *Estelle* – a decision that (as noted) did not mention *Carter* and which involved use of a defendant's statement rather than inferences drawn from his silence.

Mitchell v. United States. In *Mitchell v. United States*, 526 U.S. 314 (1999), the Court held that (1) a guilty plea is not a waiver of the Fifth Amendment privilege at sentencing; and (2) a sentencing court may not draw an adverse inference in determining facts about the crime which, if found, would increase the sentencing range. The Court did not declare that a *Carter* instruction is required at the close of *every* post-guilty plea penalty phase where the defendant does not testify; and it did not declare that a *Carter* instruction is required when no facts as to which the government bears the burden of proof are in dispute.

Mitchell pleaded guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine, but did not plead guilty to the drug quantity attributable to her under the conspiracy count. She faced a 10-year mandatory

minimum sentence if the quantity was more than 5 kilograms. After the government explained the factual basis for the charges, the district judge asked Mitchell, "Did you do that?" She answered, "Some of it." *Id.* at 318. Mitchell's co-defendants testified regarding the amount of cocaine Mitchell had sold, but Mitchell put on no evidence and did not testify to rebut her co-defendants' testimony. The court found the co-defendants' testimony to be credible, ruled that she sold more than 5 kilograms, and therefore imposed the mandatory minimum sentence of 10 years. The district judge told Mitchell: "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times . . . . I'm taking the position that you should come forward and explain your side of this issue." *Id.* at 319.

In reversing, the Court held that it "decline[s] to adopt an exception" to *Griffin* "for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime." *Id.* at 328. The Court reiterated that the Fifth Amendment prevents a person from being compelled in any criminal case to be a witness against himself and underscored that the central purpose of the Fifth Amendment privilege was "to protect a defendant from being the unwilling instrument of his or her own condemnation." *Id.* at 329. And the Court explained that "[t]o say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*." *Id.* at 329.

The Court tied its holding closely to the government's burden of proof. "The question was whether the Government had carried its burden to prove its allegations while respecting the defendant's individual rights. The government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Id.* at 330. The Court added the caveat that "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility" – matters on which the government does not bear the burden of proof – "is a separate question. It is not before us, and we express no view on it." *Id.*

Mitchell clearly establishes that, at a sentencing hearing, the government cannot attempt to meet its burden of proving a fact "respecting the circumstances and details of the crime" that, if found, increases the sentencing range by inferring the existence of that fact from the defendant's failure to testify. By contrast, the decision expressly left open – and thus established no clear law – on whether the sentencer may draw inferences from a defendant's silence when assessing other matters, such as remorse or acceptance of responsibility.

2. *Carter*, *Estelle*, and *Mitchell* do not clearly establish a constitutional right to a no-adverse-inference instruction during a penalty phase proceeding that follows a defendant's plea of guilty to the crimes and all aggravating circumstances.

The *Carter-Estelle-Mitchell* trilogy does not clearly establish a rule that entitled Woodall to a no-adverse-inference instruction. Standing alone, *Carter* plainly falls short, for it did not reach beyond the guilt-innocence phase. *Griffin*, which *Carter* extended, dealt only with the guilt phase of a trial. *See Portuondo v. Agard*, 529 U.S. 61, 69 (2000) ("*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt"). The instruction Carter sought asked that the jury be barred from drawing "an inference of guilt." *Carter*, 450 U.S. at 289. And nothing in the opinion suggested its holding extended to a sentencing hearing. *See also id.* at 307 (Stevens, J., concurring) (stating that the Court's holding was "limited to cases in which the defendant has requested that the jury be instructed not to draw an inference of *guilt* from the defendant's failure to testify") (emphasis added).

Estelle likewise cannot bear the weight the Sixth Circuit placed on it. As discussed, *Estelle* did not involve what inferences a jury may, or may not, draw from a defendant's silence. How could it, since it dealt with the government's use of a defendant's *statement*? To be sure, *Estelle* broadly stated that it could

"discern no basis to distinguish between the guilt and penalty phases." This Court has held time and again, however, that "clearly established Federal law" within the meaning of §2254(d)(1) refers to the holdings, as opposed to the *dicta*, of decisions of this Court. *Berghuis v. Smith*, 559 U.S. 314, 332-333 (2010); *Thaler v. Haynes*, 559 U.S. 43, 47 (2010) (*per curiam*); *Carey v. Musladin*, 549 U.S. 70, 74 (2006). Further, the Court has stated that it "has never extended *Estelle*'s Fifth Amendment holding beyond its particular facts." *Penry v. Johnson*, 532 U.S. 782, 795 (2001).

That leaves *Mitchell*. But the leap from *Mitchell*'s holding to the rule proposed by Woodall is a long one. *Mitchell* (1) did not involve a requested no-adverse-inference instruction (the judge, during a sentencing hearing, expressly drew an adverse inference); and (2) involved "factual determinations respecting the circumstances and details of the crime" (3) as to which the government bore the burden of proof, and which (4) if found, would increase the sentencing range. None of those factors appears here.

Neither the trial court nor the prosecutor told the jury that it should or may draw an adverse inference from Woodall's failure to testify. More importantly, through his guilty plea, Woodall acknowledged his guilt beyond a reasonable doubt of murder and the aggravating facts that made him eligible for the death sentence. Thus, the sentencing hearing did not involve disputed facts "respecting the circumstances and details of the crime," issues as to which the

government bore the burden of proof, or facts that, if found, would increase the sentencing range.

These differences between *Mitchell* and this case are not minor and inconsequential. *Mitchell* extended *Griffin*, not *Carter*, to a sentencing hearing. This Court still has not expressly held that a *Carter* no-adverse-inference instruction is required at a sentencing proceeding before a jury. And intervening case law calls into question whether *Mitchell* even counts as a "sentencing" case. In *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id.* at 2155. The disputed facts in *Mitchell* were therefore elements of the offense, not mere sentencing factors. When the trial judge held that Mitchell sold more than 5 kilograms of cocaine, the judge was finding – based in large part on an inference from Mitchell's silence – that Mitchell was guilty of a greater offense. This Court has never held that *Griffin*, let alone *Carter*, applies to what current law would consider purely a sentencing proceeding.

Even putting that aside, *Mitchell* rested heavily on the government's relieving itself of its burden of proof through adverse inferences from a defendant's silence. *See* 526 U.S. at 330. That is closely connected to *Mitchell*'s emphasis that the adverse inference regarded facts "respecting the circumstances and details of the crimes." *Id.* at 328; *see also id.* at 329 (respecting "the commission of disputed criminal acts"); *id.* (respecting "the specifics of the crime"); *id.* at 330

("relevant to the crime"). It is normally the government's burden to prove the facts of the crime; and under *Apprendi* and later cases, it is the government's burden to prove beyond a reasonable doubt facts that increase "the prescribed range of sentences to which a defendant is exposed." *Alleyne*, 133 S.Ct. at 2158 (plurality opinion).

That *Mitchell* did not clearly establish that a no-adverse-inference instruction was required here is confirmed by the Court's statement that "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility is a separate question" upon which "we express no view." 526 U.S. at 330. That caveat dooms any contention that the *Carter* instruction applies to the entirety of all sentencing proceedings in which the defendant does not testify. And it is consistent with reading *Mitchell* as focused on facts related to the crime itself as to which the government bears the burden of proof.

3. Woodall's arguments about Kentucky law do not bring him within the purview of *Mitchell*.

Here, even before the penalty phase began, the government had met its burden of proof as to all facts on which it carried the burden, including all facts that would increase the sentencing range. Woodall argues that certain facts were in dispute such as Woodall's low IQ, the conditions of his upbringing, and whether he was sexually abused. Brief in

Opposition (BIO) 17. These "facts" do not, however, pertain to the circumstances of the crimes; they are alleged mitigating circumstances. States may require mitigating circumstances to be proven by the defense, *see Delo v. Lashley*, 507 U.S. 272, 276 (1993) (*per curiam*); *Kansas v. Marsh*, 548 U.S. 163, 170-173 (2006). Kentucky follows that procedure. *See Thompson v. Commonwealth,* 147 S.W.3d 22, 48-50 (Ky. 2004). The absence of any requirement under Kentucky law to weigh aggravating against mitigating circumstances further rules out any burden on the prosecution regarding mitigation. KRS 532.025; *id.,* 147 S.W.3d at 49-50. The absence of a *Carter* instruction therefore did not create the risk that the government would relieve itself of its burden of proof or that Woodall's silence could be used to subject him to a higher sentencing range.

Although Woodall points out that Jury instruction No. 1 (J.A. 40) instructed the jury to presume him innocent of the aggravating circumstances unless it believed from the evidence that the aggravating circumstances existed beyond a reasonable doubt (BIO 16-17), this instruction was both incorrect and superfluous as Woodall had already admitted guilt to all charges, including the aggravating circumstances. An aggravating circumstance may be found at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 971-972 (1994) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988); *Flamer v. Delaware*, 68 F.3d 736, 758 (3rd Cir. 1995) (*en banc*) (Alito, J.) (upholding jury instruction directing jury to apply guilt

phase verdict in finding aggravating circumstance)). "Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears." *Lashley*, 507 U.S. at 278 (citing *Herrera v. Collins*, 506 U.S. 390, 399 (1993)). "An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a 'genuine danger' that the jury will convict based on something other than the State's lawful evidence, proved beyond a reasonable doubt." *Id.* at 278 (citing *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) (*per curiam*)).

In spite of the instruction, the aggravating circumstances were not contested. During closing argument, trial defense counsel candidly explained to the jury that Woodall had pleaded guilty to the murder, kidnapping, and rape of Sarah Hansen because he was guilty. Specifically, trial defense counsel said, "[the prosecutor] has talked to you about aggravating circumstances, and I said before, and I will tell you again, he [Woodall] did those things. We've not denied that. We've not offered a defense to that. He did those things." J.A. 69. There was simply no dispute regarding the facts and circumstances of the crimes.

A discussion between the trial court, the prosecutor, and trial defense counsel sheds some light on why the jury was instructed on aggravating circumstances in spite of the fact that Woodall had already pleaded guilty to those circumstances. The parties believed that KRS 532.025 required the jury to specify the aggravating circumstances on which it relied. Therefore, the jury was instructed regarding aggravating

circumstances due to a perceived statutory requirement, not because the aggravating circumstances were contested.

In addition, Woodall's claim regarding Jury instruction No. 6 (J.A. 44), that the jury was precluded from imposing a death sentence if the jury had a reasonable doubt, also fails. BIO 17. First, the Kentucky Supreme Court has ruled that KRS 532.025 does not require the jury to find that death is the appropriate punishment beyond a reasonable doubt or to resolve any reasonable doubt in favor of a prison sentence.[5] *Skaggs v. Commonwealth*, 694 S.W.2d 672, 680 (Ky. 1985); *Meese v. Commonwealth*, 348 S.W.3d 627, 723 (Ky. 2011). To the extent the instruction suggested otherwise, Woodall again benefited from an instruction to which he was not entitled. Second, Woodall claims (BIO 17) that this instruction mattered because it meant the jury "was required to make a finding" regarding "an explanation for the crime," and the jury should have been instructed not to hold his silence "against him" in making that determination. That argument is incoherent. Woodall's guilty plea

---

[5] Woodall's argument that a single juror could have prevented the death penalty (BIO 17) misses the point that Kentucky does not follow the "one juror veto" rule adopted in some states which permits a single juror to preclude a death sentence and requires that the court impose a prison sentence. Kentucky law requires that all 12 jurors agree upon the verdict, including the sentence verdict, and the failure to do so in the penalty phase *requires a penalty phase re-trial*. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 681 (Ky. 1985).

waived any contention that he committed this brutal murder, kidnapping, and rape because he was high on drugs, was intoxicated, or had some other legally relevant excuse. His mitigation case during the penalty phase trial could have tried to address why he committed the crime (though it is hard to imagine what such an argument would have consisted of). He did not pursue that argument, though, making it difficult to understand what "fact" the jury could have inferred against him based on his silence. Further, the prosecution did not have the burden of proving any facts regarding why Woodall committed the crime. Motive was not an element of the crimes or aggravating circumstances. Therefore, as with the mitigating circumstances that Woodall actually argued, the absence of a *Carter* instruction related to this issue could not have created the risk that the government would relieve itself of its burden of proof or that his silence could be used to subject him to a higher sentencing range.

Therefore, none of Woodall's contentions about the jury instructions are sufficient as a matter of Federal law to bring his case within the scope of the *Mitchell* ruling.

4. The absence of clearly established law defeats Woodall's claim for habeas relief.

Because there was no "clearly established" Federal law requiring the trial court to give the no-adverse-inference instruction here, §2254(d)(1) barred the

Sixth Circuit from granting habeas relief. Woodall cannot overcome this absence of clearly established law by contending that this Court would likely extend its precedents to this new terrain. Even if that were so – and it is not – the rule he requests would be a new one, not a clearly established one.

The Sixth Circuit's contrary conclusion conflicts with *Carey v. Musladin*, 549 U.S. 70, 77 (2006), and *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (*per curiam*). In *Musladin*, this Court addressed the rule announced in *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), that "certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial." *Musladin*, 549 U.S. at 72. The Ninth Circuit applied that general rule and held that a California state court was objectively unreasonable in rejecting the claim that the defendant's due process rights were violated when, during the trial, front-row spectators wore buttons with a photograph of the victim. *Id.* at 73-74 (citing *Musladin v. Lamarque*, 427 F.3d 653, 656-658 (2005)). This Court reversed on the ground that it had not "clearly established" that such conduct could violate the right to a fair trial. *Id.* at 76-77. Whereas *Williams* and *Flynn* involved *state-sponsored* courtroom practices (such as compelling a defendant to wear prison clothes), this case involved *spectator* conduct. *Musladin*, 549 U.S. at 76. And "[t]his Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Id.*

At a high level of generality, the rule that "certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial" applied in *Musladin*, who argued that the logic of *Williams* and *Flynn* extended to his case. The Court disagreed because whether those cases extended to this different situation "[was] an open question in our jurisprudence." So too here. Likewise, in *Van Patten*, the Court addressed whether the Seventh Circuit properly granted habeas relief on the ground that a lawyer's participation at a plea hearing via speakerphone constituted a "complete denial of counsel" subject to the standard of *United States v. Cronic*, 466 U.S. 648 (1984). The Court reversed the grant of habeas relief because "[n]o decision of this Court . . . squarely addresses the issue in the case." 552 U.S. at 125, 126. *See also Nevada v. Jackson*, 133 S.Ct. 1990, 1994 (2013) (*per curiam*) (criticizing court of appeals for using too "high a level of generality" when finding there to be "clearly established law"); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) ("this Court has held on numerous occasions that it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court").

5. At the very least, no clearly established law required the trial court to give the specific instruction proposed by Woodall.

Woodall did not request a true *Carter* instruction; he requested a modified *Carter* instruction that would have told the jury, "A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." J.A. 31. By its plain terms, the proposed instruction would have told the jury it could not take Woodall's silence into account when assessing whether he showed a lack of remorse. The trial court concluded that a defendant's silence bears on that determination, and accordingly rejected the instruction. J.A. 36-39. That conclusion cannot possibly have misapplied clearly established law, given that *Mitchell* expressly left open whether a defendant's "silence" may "bear[ ] upon the determination of lack of remorse." 526 U.S. at 330.

The issue of remorse was before the penalty phase jury. The prosecutor elicited testimony on cross-examination showing that Woodall's actions after murdering Sarah Hansen showed a lack of remorse. 10 T.E. 1464-1466. Woodall's proposed instruction would have barred the jury from taking his silence into account with respect to that issue, as noted by the trial judge when he rejected the instruction (stating that he did not believe Kentucky law permitted a defendant to "go out and rape and murder and kidnap and admit to it and then offer no testimony, . . . no remorse, and the jury can't consider

that"). J.A. 38. That decision did not contravene clearly established law, even if *Carter*, *Estelle*, and *Mitchell* reach further than §§I(A)(1)-(2), *supra*, contend they do.

B. The Kentucky Supreme Court's decision was not "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

The Sixth Circuit concluded that the Kentucky Supreme Court unreasonably applied *Carter*, *Estelle*, and *Mitchell* because it "'unreasonably refuse[d] to extend [a legal] principle to a new context where it should apply.'" Pet. App. 8a (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000)). That holding is mistaken for two basic reasons.

First, the Sixth Circuit failed to heed the caution this Court expressed in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), about granting habeas relief on that ground. The Court agreed that "[t]here is force to th[e] argument" made by the state that "if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision." *Id.* at 666. "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions of law." *Id.*

Although §2254(d)(1) does not require a "nearly identical factual pattern before a legal rule must be

applied," *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), the legal rule must be "squarely established" by this Court. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). This case is not akin to the Court applying the general standard of *Strickland v. Washington*, 466 U.S. 668 (1984), to one of the myriad circumstances regarding defense counsel's performance. 556 U.S. at 123. Here, Woodall is asking that *Griffin* and *Carter* be extended to a new portion of a trial, one that involves very different issues and considerations than the portion of a trial to which *Griffin* and *Carter* previously extended. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 347 (1992) (holding that a defendant can show "actual innocence of the death penalty" by showing innocence of aggravating factors, but not by challenging the exclusion of mitigation evidence).

Second, the Sixth Circuit's holding fails on its own terms. Even if *Carter*, *Estelle*, and *Mitchell* clearly established the law governing this case, the Kentucky Supreme Court did not unreasonably apply it. This Court has long held that "[i]t is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous . . . . Rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (internal citations and quotation marks omitted). In response to courts of appeals' failure to heed that caution, this Court more recently restated it more emphatically: to obtain "habeas corpus from a federal court, a state prisoner must show that the state

court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter,* 131 S.Ct. at 786-787 (internal quotation marks and citations omitted).

Given the many important differences discussed above between this case and *Carter*, *Estelle*, and *Mitchell*, the Kentucky Supreme Court's refusal to extend those cases' holdings to this case does not remotely meet that standard. Fairminded jurists could readily disagree over how far this Court's no-adverse-inference precedents should extend. The Sixth Circuit failed to heed the limits Congress imposed on federal habeas when it enacted AEDPA in 1996.

II. Even if there were error, it was harmless under the *Brecht v. Abrahamson* "substantial and injurious effect" standard.

A. Trial error is harmless unless it had substantial and injurious effect or influence in determining the jury's verdict.

In *Brecht v. Abrahamson,* 507 U.S. 619 (1993), this Court adopted the following standard for harmless error review in habeas cases: whether the constitutional error had "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637 (quoting *Kotteakos v. United States,* 328 U.S. 750 (1946)). This standard "protects the State's sovereign

interest in punishing offenders and 'good-faith attempts to honor constitutional rights,' while ensuring that the extraordinary remedy of habeas corpus is available to those 'whom society has grievously wronged[.]'" *Calderon v. Coleman,* 525 U.S. 141, 146 (1998) (*per curiam*) (citations omitted). As the Court explained: "The social costs of retrial or resentencing are significant . . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error. *Brecht, supra*, at 637." *Id.*

In *O'Neal v. McAninch,* 513 U.S. 432, 437 (1995), this Court recognized that the rare case might sometimes arise where the record is so evenly balanced that a conscientious judge is in "grave doubt" as to the harmlessness of an error. Recognizing that the circumstance of "grave doubt" is "unusual," this Court stated, "[n]ormally a record review will permit a judge to make up his or her mind about the matter. And indeed a judge has an obligation to do so." *Id.* at 435.

B. The absence of a *Carter* instruction in this case did not have substantial and injurious effect on the jury's verdict.

Even if the judge should have given a no-adverse-inference instruction, its absence did not remotely have substantial and injurious effect on the jury's verdict. The brutality and senselessness of Woodall's

crimes, and his post-crime conduct, overwhelm any negative inference the jury may have drawn from his silence. In addition to Woodall's plea of guilt, the jury heard undisputed evidence that he kidnapped the 16-year-old victim, beat her from head to toe, and cut her throat twice, severing her trachea and her supporting neck muscles. After raping her, he dragged her, unclothed, down a gravel road where he threw her in an ice cold lake to drown. An abundance of forensic evidence corroborated Woodall's brutal and heinous crimes. In addition, regarding the issue of remorse, the jury heard testimony from Woodall's mother that, shortly after the murder, Woodall came to her house, sat in a recliner, and fell asleep watching television as if nothing had happened. Besides these atrocious crimes, the jury heard evidence that Woodall had previously been convicted of sexually abusing someone else and while serving his prison sentence, he was terminated from the Sexual Offender Treatment Program for excessive absences. Furthermore, Woodall's aunt testified he had sexually abused two of her daughters.

In addition to evidence of Woodall's guilty plea, the jury also heard evidence regarding mitigating circumstances. These circumstances included, among other things, that Woodall had a spastic colon, that he had an IQ of 74, that he grew up in a dirty impoverished house, that he abused cannabis, and that he had a personality disorder with paranoid and borderline traits.

In light of the record as a whole, the absence of the *Carter* instruction cannot be said to have had "substantial and injurious effect or influence in determining the jury's verdict."

C. The Sixth Circuit erred when it engaged in speculation and possible-harm review.

In spite of the overwhelming evidence of guilt of these heinous crimes, and in spite of the fact that the jury heard nothing about Woodall's silence from either the prosecution or the trial court, the Sixth Circuit assumed that there was "a very real risk" that his silence "had substantial and injurious effect or influence" on the verdict. The court committed two fundamental errors in holding that any error here was not harmless. It watered down the *Brecht* standard into a possible-harm standard; and it did not consider the overwhelming case for the death sentence on the facts presented.

Specifically, the Sixth Circuit stated, "[b]ecause we cannot know what led the jury to make the decision it did, and because the jury may well have based its decision [to sentence Woodall to death] on Woodall's failure to testify, we cannot conclude that this is a case of 'harmless error.'" Pet. App. 11a. Under that standard, no error will ever be harmless because one can never know what led a jury to its decision and it is always possible that a jury based its

decision on the alleged error in question. But that is not the standard under *Brecht*.

The Sixth Circuit used pure conjecture to establish grave doubt and ignored the evidence as a whole including overwhelming evidence of Woodall's guilt of the heinous crimes and circumstantial evidence that Woodall lacked remorse for the crimes based upon his conduct after the crimes. Instead, the Sixth Circuit erroneously based its ruling upon the possibility that the jury "may" have sentenced Woodall to death because he didn't testify. As Judge Cook noted, this is a mere possible-harm standard. "Alas, the correct harmless-error standard does not permit such speculation, and neither does the undisputed evidence of this heinous crime." Pet. App. 24a.

While the Sixth Circuit paid lip-service to *Brecht* by citing its "substantial and injurious effect" standard, the court actually concluded it could not say the alleged error was harmless because there was no way to tell what led the jury to make the decision it did. Pet. App. 11a. The court, in support of its position, stated that the trial court "appears to have drawn an adverse inference from Woodall's decision not to testify: in denying the requested instruction, the trial court stated that it was 'aware of no case law that precludes the jury from considering the defendant's lack of explanation of remorse or explanation of the crime or anything else once guilt has been adjudged in sentencing.'" J.A. 36. But the jury did not hear this statement, and it was the jury, not the trial court, that recommended Woodall's death sentence.

In light of the record as a whole, the fact that Woodall did not get a no-adverse-inference instruction had no substantial and injurious effect or influence in determining the jury's verdict. The Sixth Circuit failed to consider the record as a whole and did not give enough consideration to the aggravating circumstances.

Woodall received the death penalty based upon what he did, not based upon the fact that he did not testify. There is no reasonable basis to conclude that the absence of the modified *Carter* instruction and the mere failure of Woodall to testify substantially influenced the jury to ignore Woodall's mitigating evidence and to impose the death sentence without regard to the evidence.

CONCLUSION

For the reasons stated above, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY
SUSAN RONCARTI LENZ*
ASSISTANT ATTORNEY GENERAL
IAN G. SONEGO
SPECIAL ASSISTANT
ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342
susan.lenz@ag.ky.gov
Attorneys for Petitioner

**Counsel of Record*

RESPONDENT'S BRIEF

No. 12-794

Supreme Court, U.S.
NOV 12 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

HEATHER E. WILLIAMS
Federal Defender
DAVID H. HARSHAW III
Assistant Federal Defender
OFFICE OF THE FEDERAL DEFENDER
EASTERN DISTRICT OF CALIFORNIA
801 I Street, 3rd Floor
Sacramento, CA 95616
(916) 498-6666

LAURENCE E. KOMP*
Attorney at Law
P.O. Box 1785
Manchester, MO 63011
(636) 207-7330
lekomp@swbell.net

DENNIS J. BURKE
Assistant Public Advocate
DEPARTMENT OF PUBLIC ADVOCACY
207 Parker Drive, Suite 1
LaGrange, KY 40031
(502) 222-6682

Counsel for Respondent Robert Keith Woodall

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES v

STATEMENT OF FACTS AND CASE 1

A. Introduction 1

B. Woodall pled guilty and requested jury sentencing 1

C. Woodall waived his right to testify and requested a *Carter* instruction protecting his election not to testify. 5

D. The jury was instructed that it had to find beyond a reasonable doubt that death was the appropriate punishment. 6

E. The jury heard closing argument and returned a death verdict. 7

F. The Kentucky Supreme Court affirmed the trial court's denial of a *Carter* instruction. 8

G. The Federal District Court and the Federal Circuit Court granted Woodall habeas relief after determining the Kentucky Supreme Court unreasonably and prejudicially denied the *Carter* instruction 11

SUMMARY OF ARGUMENT 16

Table of Contents

Page

ARGUMENT.....20

I. Woodall had a clearly established constitutional right to the no-adverse-inference instruction he requested during the capital penalty phase when he declined to testify. The adjudication of his claim in state court involved an unreasonable application of this Court's existing precedent.....20

A. 28 U.S.C. § 2254(d)'s Framework.....20

B. This Court's precedent clearly establishes the Fifth Amendment right to a no-adverse-inference instruction in a capital sentencing trial.....23

1. *Carter*: a no-adverse-inference instruction must be given if requested by a defendant.....24

2. *Estelle*: the Fifth Amendment applies to a capital sentencing phase even after a jury's guilt finding.....25

3. *Mitchell*: a guilty plea does not waive Fifth Amendment rights at a subsequent sentencing proceeding, and no adverse inference may be raised by a defendant's exercise of his right not to testify.....27

Table of Contents

Page

C. The Kentucky Supreme Court's decision unreasonably applied these precedents.....30

1. The Kentucky Supreme Court unreasonably ruled that a guilty plea eliminated any Fifth Amendment protection.....31

2. The Kentucky Supreme Court's decision unreasonably limited *Estelle* because it was not a jury instruction case.....32

3. The Kentucky Supreme Court's decision unreasonably required compelled testimony before *Estelle* applied.....33

4. The Kentucky Supreme Court unreasonably ruled that this Court's precedents did not apply, because no facts were in dispute when the Commonwealth had to establish beyond a reasonable doubt that death was the appropriate sentence.....34

5. Petitioner's further arguments do not otherwise prove the correctness of the Kentucky Supreme Court's decision.....41

Table of Contents

Page

II. The Fifth Amendment error had substantial and injurious effect. 43

A. The Sixth Circuit correctly applied the *Brecht* and *O'Neal* standards. 43

1. The Sixth Circuit did not deviate from *Brecht* and *O'Neal*. 44

2. Jurors will hold silence against a defendant unless instructed otherwise. 46

3. The jury would have wanted to hear Woodall express remorse. 51

4. The jury would have wanted an explanation from Woodall for his conduct. 53

5. The jury would have wanted to hear Woodall confirm the mitigation. 55

B. Alternatively, the Kentucky Supreme Court unreasonably applied *Chapman* . . .57

CONCLUSION 59

TABLE OF CITED AUTHORITIES

Page

Cases

Abdul-Kabir v. Quarterman,
550 U.S. 233 (2007) 21, 30, 41

Armstrong v. Bertrand,
336 F.3d 620 (7th Cir. 2003) 22

Atkins v. Virgina,
536 U.S. 304 (2002).....39, 55

Ballard v. Commonwealth,
2012 WL 601215 (Ky. 2012).....46

Beathard v. State,
767 S.W.2d 423 (Tex. Cr. App. 1989) 27, 31

Bierenbaum v. Graham,
607 F.3d 36 (2d Cir. 2010) 21

Booth-El v. Nuth,
288 F.3d 571 (4th Cir. 2002) 22

Brecht v. Abrahamson,
507 U.S. 619 (1993)..... *passim*

Brown v. Commonwealth,
313 S.W.3d 577 (Ky. 2010) 35

Brown v. Sanders,
546 U.S. 212 (2006).....36

Cited Authorities

Page

Buchanan v. Kentucky,
483 U.S. 402 (1987) 26

Burns v. State,
699 So. 2d 646 (Fla. 1997) 31

California v. Brown,
479 U.S. 538 (1987) 40

Campbell v. Coyle,
260 F.3d 531 (6th Cir. 2001) 22

Carey v. Musladin,
549 U.S. 70 (2006) 21

Carter v. Kemna,
255 F.3d 589 (8th Cir. 2001) 22

Carter v. Kentucky,
450 U.S. 288 (1981) ..... *passim*

Chapman v. California,
386 U.S. 18 (1967) 57, 58

Childers v. Commonwealth,
332 S.W.3d 64 (Ky. 2010) 52

Commonwealth v. McIntosh,
646 S.W.2d 43 (Ky. 1983) 6

Cited Authorities

Page

Counselman v. Hitchcock,
142 U.S. 547 (1892) 23, 41

Cross v. Commonwealth,
2009 WL 4251649 (Ky. 2010) 46

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 58

Estelle v. Smith,
451 U.S. 454 (1981) ..... *passim*

Fields v. Commonwealth,
274 S.W.3d 375 (Ky. 2008) 52

Fry v. Pliler,
551 U.S. 112 (2007) 44, 57, 58

Gardner v. Florida,
430 U.S. 349 (1977) 36

Green v. Georgia,
442 U.S. 95 (1979) 36

Griffin v. California,
380 U.S. 609 (1965) ..... *passim*

Harrington v. Richter,
131 S. Ct. 770 (2011) 22

Cited Authorities

Page

Ice v. Commonwealth,
667 S.W.2d 671 (Ky. 1984) 36

In re Gault,
387 U.S. 1 (1967) 23, 41

Jackson v. Commonwealth,
392 S.W.3d 907 (Ky. 2013) 46

Jurek v. State,
522 S.W.2d 934 (1975) 42

Jurek v. Texas,
428 U.S. 262 (1976) 41

Kibbe v. DuBois,
269 F.3d 26 (1st Cir. 2001) 21

Kimbrough v. Secretary, DOC,
565 F.3d 796 (11th Cir. 2009) 22

Lakeside v. Oregon,
435 U.S. 333 (1978) ..... *passim*

Lockett v. Ohio,
438 U.S. 586 (1978) 55

Lockyer v. Andrade,
538 U.S. 63 (2003) 20, 22, 58

Page

Lowenfeld v. Phelps,
484 U.S. 231 (1988) 42

Malloy v. Hogan,
378 U.S. 1 (1964) 23

Middleton v. Evatt,
1996 U.S. App. LEXIS 2181 (4th Cir. 1996) 31

Miller v. Blackletter,
525 F.3d 890 (9th Cir. 2008) 22

Mills v. Maryland,
486 U.S. 367 (1988) 40

Mitchell v. United States,
526 U.S. 314 (1999) ..... *passim*

O'Neal v. McAninch,
513 U.S. 432 (1995) ..... *passim*

Old Chief v. United States,
519 U.S. 172 (1997) ..... *passim*

Panetti v. Quarterman,
551 U.S. 930 (2007) 20, 22

Parker v. Matthews,
132 S. Ct. 2148 (2012) 22, 41, 58

Cited Authorities

Page

Parker v. Scott,
394 F.3d 1302 (10th Cir. 2005) 22

Parrish v. Commonwealth,
121 S.W.3d 198 (Ky. 2003) 35

Penry v. Johnson,
215 F.3d 504 (5th Cir. 2000), *aff'd in part, rev'd in part*, 532 U.S. 782 (2001) 22, 26, 27

Penry v. Lynaugh,
492 U.S. 302 (1989) 55

People v. Leonard,
40 Cal. 4th 1370 (Cal. 2007) 31

People v. Ramirez,
457 N.E.2d 31 (Ill. 1983) 31

Presnell v. Georgia,
439 U.S. 14 (1978) 36

Purdue v. Commonwealth,
916 S.W.2d 148 (Ky. 1995) 35

Ramdass v. Angelone,
530 U.S. 156 (2000) 21

Sears v. Upton,
130 S. Ct. 3259 (2010) 44

Cited Authorities

Page

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 20, 26

Skaggs v. Commonwealth,
803 S.W.2d 573 (Ky. 1990) 15, 35

Skipper v. South Carolina,
476 U.S. 1 (1986) 55

State v. Edwards,
116 S.W.3d 511 (Mo. 2003) 31

State v. Mayes,
63 S.W.3d 615 (Mo. 2001) 52

State v. Middleton,
368 S.E.2d 457 (S.C. 1988) 31

State v. Munn,
56 S.W.3d 486 (Tenn. 2001) 31

Strickland v. Washington,
466 U.S. 668 (1984) 44

Stringer v. Black,
502 U.S. 222 (1992) 36, 54

Tyler v. Cain,
533 U.S. 656 (2001) 21

Cited Authorities

Page

United States ex rel. Bilokumsky v. Tod,
263 U.S. 149 (1923) 45, 47, 48

United States v. Jackson,
390 U.S. 570 (1968) 37, 54

United States v. Whitten,
610 F.3d 168 (2d Cir. 2010) 31

Wetzel v. Lambert,
132 S. Ct. 1195 (2012) 22, 41, 58

Wiggins v. Smith,
539 U.S. 510 (2003) 20, 56

Williams v. Price,
343 F.3d 223 (3d Cir. 2003) 21-22

Williams v. Taylor,
529 U.S. 362 (2000) 12, 20, 21

Woodson v. North Carolina,
428 U.S. 280 (1976) 54

Wright v. Van Patten,
552 U.S. 120 (2008) 21

Yarborough v. Alvarado,
541 U.S. 652 (2004) 42

Zant v. Stephens,
462 U.S. 862 (1983) 37, 54

Cited Authorities

Page

Statutes and Other Authorities

United States Constitution, Fifth Amendment. . . *passim*

United States Constitution, Fourteenth Amendment. . .23

28 U.S.C. § 2254(d) . . . . . *passim*

USSG § 3E1.1. 38

Federal Sentencing Guidelines Manual, Chap. 3, Part E (2013-14) 38

Am. Ass'n of Intellectual and Developmental Disabilities, Intellectual Disability: Definitions, Classification, and Systems of Supports (11th ed. 2010) 39

Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 Cal. L. Rev. 1011 (1978) 49

Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557 (1998). 53

STATEMENT OF FACTS AND CASE

A. Introduction

Robert Keith Woodall chose not to testify at his capital sentencing trial. He requested a jury instruction that his silence not be held against him. The trial court denied the instruction, stating that the jury could consider his failure to offer testimony. The Kentucky Supreme Court upheld the denial of the instruction. The two questions before this Court are whether the Kentucky Supreme Court unreasonably applied this Court's clearly existing federal law, and, if its application was unreasonable, whether the error prejudiced Woodall.

B. Woodall pled guilty and requested jury sentencing.

Woodall pled guilty to the abduction, rape and murder of Sarah Hansen, a sixteen year-old high school student. TE 405-417. He requested and received jury sentencing. Woodall attempted to *voir dire* the jurors to assess their understanding that Woodall did not have to testify and that a decision not to testify could not be held against him. However, the trial court refused this inquiry. TE 697-8.

The Commonwealth presented eleven witnesses. TE 1191-1342. The evidence established that Ms. Hansen was kidnapped from a convenience store parking lot, taken to an isolated location, raped, then murdered. *See id.* Woodall had previously been convicted and sent to prison for two counts of sexual abuse. TE 1330-1331. The prosecutor and his assistant read into the record an abbreviated version of the guilty plea. JA 25-30. From

this simulated colloquy, the jury heard Woodall plead guilty to three crimes: murder, kidnapping, and rape. JA 27-28. The jury also heard Woodall's waiver of his "right against self-incrimination, which means you don't have to say anything . . ." JA 29.

Going beyond the factual predicate of the plea, the Commonwealth introduced testimony by a blood spatter expert theorizing the position of Ms. Hansen during the crime and other circumstances regarding the crime. TE 1274-75. Woodall objected to the nature of this evidence. Overruling this objection, trial court allowed this testimony:

> You've got a defendant who's pled guilty to some pretty atrocious crimes, and you're asking this jury to make a – set a penalty. I think that the Commonwealth should have a certain amount of leeway in putting forth its theory as to how this crime occurred, and for that reason, I'm going to let him testify to this.

TE 1276. The trial court also overruled a later objection related to the extent of the theorized struggle by Ms. Hansen. TE 1283-4.

Woodall presented fourteen mitigation witnesses. TE 1343-1585. The jury learned that at the age of 17, Woodall tested with a full scale IQ of 74. TE 1501. His IQ range was between 69-79 considering the standard error of measurement. TE 1501-1502. Although he was 17, Woodall functioned at the age equivalency of an 11 or 12 year-old. TE 1503. The testing psychologist recommended that Woodall's school move him to a special program for educable mentally handicapped children. TE 1505.

At trial, Woodall's IQ tested at 78. TE 1526. He again placed in the borderline range of intelligence. TE 1534. Other testimony established that Woodall had a personality disorder with borderline and paranoid traits. TE 1546. This disorder "impairs a person's ability to relate to other people and to interact appropriately in society." TE 1558. However, Woodall is someone who does well in a controlled environment. TE 1578. Woodall exhibited good behavior while incarcerated. TE 1490-1492. In jail, he was cooperative, did not complain, and did not have conflicts with prisoners or guards. *Id.*

Woodall was the son of a teenage mom, who suffered from depression. TE 1421, 1433, 1454. She was not nurturing; rather than care for her children she would play videogames or watch television. TE 1408. Woodall's mother was unmotivated to "do anything." TE 1408-9. She had trouble maintaining a job and a home; the trailer was often full of dirty dishes, dirty clothes, and vermin. TE 1409-10. Woodall's aunt recalled: "[I]t was just nasty, and the roaches was just crawling all over." TE 1421.

Woodall's dad was an absent father and a poor provider. TE 1435, 1450, 1476. He had money for alcohol and pot, but no money to feed his kids. TE 1435. He did not work much. *Id.* He cheated on Woodall's mother, which led to a divorce. TE 1436. After Woodall's father moved out, Woodall and his siblings would rarely see him. TE 1415. Even when his father scheduled visitation, he often failed to show up. TE 1415, 1439.

Throughout his childhood, Woodall and his siblings lived in poverty. On occasion, they had to walk to their grandparents' home to get water. TE 1410, 1435. One

winter the family had no heat. TE 1410. Woodall often appeared at his grandparents' home unwashed, unfed, and smelling like sour milk. TE 1409, 1411.

Growing up, Woodall had incontinent bowels. TE 1436. He defecated without warning. *Id.* His condition persisted into middle school. TE 1417-18. Woodall would hide his soiled underwear around the house. *Id.* The bowel condition had begun as constipation when Woodall was just an infant. TE 1439. His grandmother testified, "[H]e would always draw his little old legs up and just scream and turn red as a beet." *Id.* His family sought to relieve the pain by inserting slivers of soap into his rectum. *Id.* Woodall's expert told the jury that this treatment was a form of sexual abuse. TE 1581. The expert also testified that victims of sexual abuse are more likely to become sexual offenders. *Id.*

Earlier in the trial when Woodall's father was on the stand, a juror asked him if he knew if anyone had sexually abused Woodall. TE 1480. He answered, "Not that I know of." *Id.*

The Commonwealth cross-examined each of Woodall's witnesses. TE 1353-1355, 1364-1367, 1373-1376, 1380-1383, 1389-1395, 1427-1430, 1445, 1461-1474, 1480, 1488-1490, 1493, 1508-1516, 1548-1554, 1582-1585. Particularly, the prosecutor cross-examined Woodall's mother about his immediate post-crime behavior. TE 1464-1471. Woodall objected on relevance grounds. TE 1464-1465, 1468-1470. The prosecutor explained that his intended questions related to "remorse." TE 1469. In overruling this objection, the trial court said:

> Wait a minute now. Okay, you're talking about January the 25th, the night of the murder, the fact that this man went out and committed rape, murder, kidnapping, and his own mental state – and goes back home and lays down on the couch and watches television doesn't have anything to do with this case?

TE 1465; *see also* TE 1469-1470.

C. Woodall waived his right to testify and requested a *Carter* instruction protecting his election not to testify.

After the mitigation presentation, the trial court conducted a colloquy to determine whether Woodall knowingly, intelligently and voluntarily waived his right to testify. JA 33-34. The trial court twice informed Woodall that he had the "right to take the stand." *Id.* Thereafter, Woodall requested an instruction pursuant to *Carter v. Kentucky*, 450 U.S. 288 (1981): "A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." JA 31.[1] The trial court asked the prosecutor: "I don't think the Commonwealth has objected to it being read?" JA 35. The prosecutor responded, "That is correct, your honor." JA 36.

---

1. The instruction approved of in *Carter*, 450 U.S. at 289, stated: "The [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." The only difference between Woodall's requested and *Carter* is the exclusion of "cannot be used as an inference of guilt."

The trial court, however, refused to give the instruction. The court stated: "I don't think [it's] intellectually honest and I don't think it's in keeping with the case law as far as sentencing is concerned." JA 36. The court relied on *Commonwealth v. McIntosh*, 646 S.W.2d 43 (Ky. 1983). *Id.* The judge also stated that giving the instruction "was not error where the guilt was overwhelming." *Id.* Defense counsel responded that *McIntosh* held it was error *not* to give a *Carter* instruction, albeit harmless in *McIntosh* under the whole of the case. JA. 38. The trial court, however, remained firm, stating:

> In the sentencing stage to me it defies logic, it defies common sense, it's not intellectually honest to tell this jury . . . that you go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that. I just don't think it's logical, so that's why I'm not going to give it.

JA 38.

D. The jury was instructed that it had to find beyond a reasonable doubt that death was the appropriate punishment.

The trial court instructed Woodall's jury that the Commonwealth had to prove beyond a reasonable doubt that death was justified:

> If upon the whole of the case you have a reasonable doubt whether the Defendant should

> l entenced to death, you shall instead fix his punishment at a sentence of imprisonment.

JA 44 (Instruction #6).

E. The jury heard closing argument and returned a death verdict.

Prior to closing, the defense moved *in limine* for the prosecutor not to comment on Woodall's lack of remorse. TE 1598-9. The prosecutor responded that he did not want to "expressly" say that Woodall had evidenced no remorse. TE 1599. However, he said he would comment on Woodall's demeanor as a proxy. *Id.* He further wanted to tell the jury that the guilty plea was not an acceptance of responsibility; rather it was a mere defense strategy. *Id.*

During closing argument, urging the jury to return death, the prosecutor twice mentioned Woodall's demeanor:

> [The defense will say] 'Keith has pled guilty. He's admitted he's done wrong, so we're not here for that,' and while we're talking about other defense strategies . . . [overruled objection] . . . You've heard everyone talk . . . everyone talk about their observations of the defendant. How many of those have told you that he's got a habit of sitting around looking down like this for a week at a time? Don't be fooled. Don't be fooled by that. That's not the defendant, Robert Keith Woodall.

JA 57-58;

> Now they're going to come up and try to argue a little bit in addition to why all his looking down, they're going to come back and they're going to say to you, 'Well, he had a mental illness. There was some problems.'

JA 64. In closing, the prosecutor also relied on the blood spatter expert's testimony for how the crime transpired. JA 54-56. He portrayed prolonged suffering. *Id.*

In Woodall's closing, defense counsel argued for life without the possibility of parole as the alternative to a death sentence. JA 68-69. Addressing the guilty plea, counsel argued: "[The prosecutor] can speculate as to why [Woodall] came into this Court and he said, 'I'm guilty of those things,' but he came in and he said, 'I'm guilty,' because he is guilty." JA 69.

The jury found both aggravators and returned a death verdict. JA 46

F. The Kentucky Supreme Court affirmed the trial court's denial of a *Carter* instruction.

The Kentucky Supreme Court affirmed Woodall's death sentence. Pet. App. 259a-312a. In so doing, the court also denied Woodall's claim of constitutional error in the trial court's refusal to provide a *Carter* instruction claim, stating:

> Woodall argues that he was denied due process, his right not to testify and a reliable sentence determination when the trial judge refused to instruct the jury to draw no adverse inference from the decision of Woodall not to testify

during the penalty trial. Woodall pled guilty to all of the charged crimes as well as the aggravating circumstances. The no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. That is not the situation presented here. The instruction contemplated by *Carter* [], could not have changed the outcome of a guilty determination that the defendant acknowledged by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.

There is no error in this respect. Any possible error would be nonprejudicial because the defendant admitted the crimes and the evidence of guilt is overwhelming. Woodall claims that *Estelle* [], extended Fifth Amendment protection and thus the *Carter*, *supra*, rule to the penalty phase of a trial. *Estelle*, *supra*, is not a jury instruction case, unlike *Carter*. *Estelle* does not cite to *Carter* or indicate that *Carter* has been extended. The factual situation in *Estelle* is different from that presented in this case because it involved the use of an out-of-court statement the defendant made to a government expert. The statement in that case was in regard to a psychological examination by the government prosecutors which was used against the defendant without warning in the penalty trial. Neither *Carter* nor *Estelle* involved a guilty plea. Here, Woodall admitted guilt to all charges and did not contest the facts. He was not compelled to testify so there were

no words that could be used against him so as to implicate the Fifth Amendment privilege as in *Estelle*.

Woodall contends that *Mitchell* [], permits a guilty plea which does not waive the privilege against self-incrimination at the sentencing phase. *Mitchell*, *supra*, does not apply here. In *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine within 1000 feet of a school or playground. She reserved the right to contest the amount of the cocaine at the penalty phase. The amount of the cocaine would determine the range of penalties. She only admitted that she had done "some of" the conduct charged. She did not testify. Three other codefendants did testify as to the amount of cocaine she had sold. Ultimately, the U.S. Supreme Court ruled that it would not permit a negative inference to be drawn about her guilt with regard to the factual determination respecting the circumstances and details of the crime. Here, Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes.

The decision of the trial court not to give an adverse inference instruction does not amount to constitutional error so as to require reversal. There is no violation of any section of the United States or Kentucky Constitution.

Pet. App. 261a-263a.

G. The Federal District Court and the Federal Circuit Court granted Woodall habeas relief after determining the Kentucky Supreme Court unreasonably and prejudicially denied the *Carter* instruction.

Woodall filed a federal habeas corpus petition, which included the ground that he was entitled to a *Carter* instruction. The district court granted relief:

> The issue before the Court is whether Woodall was entitled to a no adverse inference instruction. Unquestionably, Woodall was entitled to it. In this case, Woodall pleaded guilty to the underlying substantive offenses. He did not, however, agree that the sentence of death was appropriate. Instead, he retained the right to have his sentence determined by a jury of his peers. His Fifth Amendment right survived his guilty plea. *Mitchell v. United States*, 526 U.S. at 327. The government could not have compelled Woodall to testify against his will at his sentencing hearing. *Estelle v. Smith*, 451 U.S. at 454. Such conduct would have undoubtedly violated his Fifth Amendment right. *Id.* Woodall requested a no adverse inference instruction. Once requested, it should have issued. *Carter v. Kentucky*, 450 U.S. at 305. The trial judge could have given the requested instruction and prevented any undue and impermissible speculation by the jury. Even though the prosecution did not object to the instruction, the trial judge refused to issue it. In doing so, he ran afoul of clearly established

> constitutional principles and violated Woodall's constitutional rights. This is not a new rule of law as the Commonwealth argues. To the contrary, it is a logical application of then-existing Supreme Court precedent. And, the Kentucky Supreme Court's decision to reject this claim was an unreasonable application of *Carter*, *Estelle*, and *Mitchell*.

Pet App. 59a-61a. The district court held that the error was prejudicial, because absent the *Carter* instruction, "the jury may have based its decision to sentence Woodall to death on his failure to testify." Pet. App. 63a. The district court relied on the trial court's "forceful" statement that the jury logically would consider Woodall's silence. *Id.*

The Commonwealth appealed to the Sixth Circuit, which affirmed, concluding:

> We agree with the district court that reading *Carter*, *Estelle*, and *Mitchell* together, the only reasonable conclusion is that the trial court violated Woodall's Fifth Amendment rights by refusing to give a requested "no adverse inference" instruction. The Kentucky Supreme Court's denial of this constitutional claim was an unreasonable application of *Carter*, *Estelle*, and *Mitchell*. *See Williams*, 529 U.S. at 407 [] ("[A] state-court decision [is] an unreasonable application of [the Supreme] Court's precedent if the state court ... unreasonably refuses to extend [a legal] principle to a new context where it should apply.") ... The district court held that a capital defendant has a Fifth

> Amendment right to a "no adverse inference" instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement. We agree. "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Estelle*, 451 U.S. at 463 []. At stake in the penalty phase of a capital trial such as Woodall's is not only what specific punishment the defendant will receive, but whether he will be put to death. The due process clause requires that a trial court, if requested by the defendant, instruct the jury during the penalty phase of a capital trial that no adverse inference may be drawn from a defendant's decision not to testify.

Pet. App. 8a-9a.

The court then addressed prejudice:

> For purposes of federal habeas corpus review, a constitutional error that implicates trial procedures is considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 [] (1993)..."Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " *Brecht*, 507 U.S. at 637...

The Supreme Court has observed that "it is arguable that a refusal to give [a 'no adverse inference' instruction] can never be harmless." *Carter*, 450 U.S. at 304 [] (declining to reach the question because it was not then presented and had not been before the state court); see also *Lakeside v. Oregon*, 435 U.S. 333, 340 & n. 10 [] (1978) (discussing the likelihood that a jury will draw an adverse inference from a defendant's decision not to testify). "The Supreme Court has emphasized...that when a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." *Erwin*, 503 F.3d at 501 (internal quotation marks omitted). "[G]rave doubt" means "that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435 []; see also *id.* at 437–38 [] ("[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.").

The warden argues that any error in the court's failure to instruct the jury was harmless because of the overwhelming evidence of Woodall's guilt presented during the penalty phase and the overwhelming evidence of the heinousness of the crimes, and because Woodall admitted the statutory aggravators necessary to impose the death penalty. If it were the case

that a finding of the existence of statutory aggravators compels the imposition of the death penalty, then perhaps the trial court's error would have been "harmless." But the finding of the aggravating circumstances did not compel the jury to recommend a death sentence: the jury could have rejected the death penalty even if it found the existence of aggravating circumstances beyond a reasonable doubt. *See Skaggs v. Parker*, 235 F.3d 261, 271 (6th Cir. 2000) (describing the variety of mitigating circumstances that a jury can consider during a penalty phase under Kentucky law). Because we cannot know what led the jury to make the decision that it did, and because the jury may well have based its decision on Woodall's failure to testify, we cannot conclude that this is a case of "harmless error." *See Carter*, 450 U.S. at 304 [] (noting that it is "arguable" that refusing to give a "no adverse inference instruction" is "never" harmless); *Ullmann v. United States*, 350 U.S. 422, 426 [] (1956) ("Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."); *see also Bruno v. United States*, 308 U.S. 287, 294 [] (1939). Indeed, the trial court itself appears to have drawn an adverse inference from Woodall's decision not to testify: in denying the requested instruction, the trial court stated that it was "aware of no case law that precludes the jury from considering the defendant's lack of explanation of remorse

> or explanation of the crime or anything else once guilt has been adjudged in sentencing." The trial court's own inferences illustrate our concern. Given our grave doubt that the jury's recommendation was not influenced by adverse inferences drawn from Woodall's decision not to testify, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *O'Neal*, 513 U.S. at 437 [] (internal quotation marks omitted). Under these circumstances, "it is impossible to conclude that the substantial rights were not affected." *Id.* at 437–38 [] (internal quotation marks omitted). Therefore, under *O'Neal*, we treat the error as harmful and grant Woodall's petition on this basis.

Pet. App. 9a-12a.

SUMMARY OF ARGUMENT

The Fifth Amendment requires that a defendant receive a no-adverse-inference instruction upon request at a capital sentencing proceeding when he exercises his right not to testify. The Sixth Circuit committed no error in finding that the Kentucky Supreme Court unreasonably applied this Court's clearly existing precedents of *Carter v. Kentucky*, *Estelle v. Smith*, and *Mitchell v. United States*. This Court accepts that multiple cases can dictate a result. No requirement exists that there be an identical factual pattern before a legal rule must be applied. A state court can be unreasonable when it refuses to extend a governing

legal principle to a context in which the principle should have controlled.

Carter, *Estelle*, and *Mitchell* dictate that Woodall's Fifth Amendment right was violated. In *Carter*, the first case chronologically, this Court established that a no-adverse-inference instruction must be given if requested by a defendant. In *Estelle*, the next case, this Court found that the Fifth Amendment applies to a capital sentencing phase even after a jury's guilt finding. *Estelle* confirmed that there is no difference between the guilt and the penalty phases of a capital trial for purposes of the Fifth Amendment. Lastly, in *Mitchell*, this Court held that a guilty plea does not waive Fifth Amendment rights at a subsequent sentencing proceeding and no adverse inference may be raised by a defendant's exercise of his right not to testify. *Mitchell* treated *Estelle* as having extended the Fifth Amendment's requirements to sentencing generally and refused to create an exception to this rule for the sentencing phase of a criminal case.

Taken together, as they should be, these cases yield a logical conclusion. Under *Estelle*, the Fifth Amendment applies at a capital sentencing. Under *Mitchell*, a sentencing fact-finder is not permitted to draw adverse inferences from a defendant's silence even when there is a guilty plea. Under *Carter*, where a jury, as fact-finder, is prohibited from drawing adverse inferences, a no-adverse-inference instruction is required. Thus, upon request, a defendant must receive a *Carter* instruction at a capital sentencing proceeding when he exercises his right not to testify.

The Kentucky Supreme Court decision not to apply this clearly established law was unreasonable. The court unreasonably held that a guilty plea eliminated any Fifth Amendment protection. This is a cramped reading of *Carter* in light of *Estelle* and *Mitchell*. The court also found that *Estelle* did not apply because it was not a jury instruction case. This is a cramped reading of *Estelle* in light of *Carter* and *Mitchell*. The court next found that *Estelle* was not applicable because Woodall, unlike the defendant in *Estelle*, had not been compelled to testify against himself. This is a cramped reading of *Estelle* because the defendant in *Mitchell* had not been compelled to testify.

Focusing solely on guilt, the Kentucky Supreme Court also unreasonably found there were no contested facts at issue in Woodall's trial. The court failed to recognize that the prosecutor argued that the circumstances of the crime, beyond which Woodall had admitted, were a basis to impose death. It failed to recognize that the prosecution was affirmatively arguing that Woodall lacked remorse for his crime and that remorse, unlike the question left open by this Court in *Mitchell*, was an issue upon which Woodall had a right not to testify. The Court also failed to recognize that the prosecutor cross-examined the entirety of Woodall's case in mitigation. This put the extensive mitigation facts at issue. Moreover, the court did not consider that the jury instruction on the suitably of the death penalty required a finding that death was the appropriate punishment beyond a reasonable doubt.

This Court has applied the Fifth Amendment to a pure capital sentencing determination. *Estelle* considered a circumstance where the question before that jury was

a death penalty selection question similar to the question before Woodall's jury. Further, there is no requirement that a *Griffin v. California* error precede *Carter*'s application. *Carter* is an independent Fifth Amendment requirement.

Woodall was also prejudiced by the failure of Kentucky to provide him a no-adverse-inference instruction. This Court recognizes that jurors intuitively notice that a defendant has not testified and will hold a defendant's silence against him. As noted by the trial court, Woodall's jury would have wanted testimony and an explanation for what occurred. The jury also would have wanted to hear Woodall express remorse. Lastly, the jury would have wanted to hear Woodall confirm the truth of the mitigation.

This Court protects the reliability of capital sentencing proceedings, which includes the enforcement of fundamental constitutional rights. Woodall, at best borderline mentally retarded, was never going to be able to testify on his own behalf without risk of helping the prosecution's case for a death sentence. This Court has recognized that people with Woodall's intelligence make unreliable witnesses. This Court has also recognized that there are many reasons that any person may not want to testify. Because Woodall exercised his right not to testify, the Fifth Amendment should have protected Woodall from the adverse inference that the jury likely drew.

ARGUMENT

I. Woodall had a clearly established constitutional right to the no-adverse-inference instruction he requested during the capital penalty phase when he declined to testify. The adjudication of his claim in state court involved an unreasonable application of this Court's existing precedent.

A. 28 U.S.C. § 2254(d)'s Framework.

28 U.S.C. § 2254(d)(1), a provision of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), provides that a federal court may grant relief where the underlying state court merits decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor,* 529 U.S. 362, 404-05 (2000). Once satisfied, *de novo* review applies. *Wiggins v. Smith*, 539 U.S. 510, 528-34 (2003).

The phrase "clearly established law" employed in §2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions..." *Williams,* at 412. Holdings include the final disposition of a case as well as the preceding determinations "necessary to that result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). This Court looks for "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003). Section 2254(d)(1) does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (*quoting*

Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring)).

This Court explained in *Wright v. Van Patten*, 552 U.S. 120, 126 (2008), that federal law is "clearly established" when this Court's case law already provides a "clear answer" to the question presented. A habeas court is not limited to one Supreme Court case in making its decision. It may rely on a matrix of cases from this Court to identify the controlling principle in the case before it. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 257-258 (2007) (finding a state court's "formulation of the issue" unreasonable due to inattention to "the fundamental principles established by [this Court's] most relevant precedents."); *accord Tyler v. Cain*, 533 U.S. 656, 666 (2001).

This Court has identified different ways in which a state court's decision will violate the "unreasonable application" clause of § 2254(d)(1). A decision involves an unreasonable application of clearly established law where "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. And, "[a] state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) (plurality opinion). Every federal circuit court of appeals has recognized this well-settled principle.[2]

---

2. *Kibbe v. DuBois*, 269 F.3d 26, 36 (1st Cir. 2001); *Bierenbaum v. Graham*, 607 F.3d 36, 48 (2d Cir. 2010); *Williams*

This Court has consistently relied on the foregoing interpretation of AEDPA, and there is no reason to accept the Amicus of the Criminal Justice Legal Foundation (CJLF)'s invitation to depart from it. CJLF argues a federal court should require a case directly on point to conclude that the law is clearly established and find (d)(1) satisfied. CJLF Amicus Brief 10-16. Discounting all but a case on all fours as "clearly established" law distorts AEDPA, effectively requiring a petitioner to show the state court's ruling was "contrary to" Supreme Court law. It reads "unreasonable application" out of the statute. Adopting CJLF's proposed interpretation undermines AEDPA's text and this Court's interpretation of AEDPA. *See Lockyer*, 538 U.S. at 76; *Panetti*, 551 U.S. at 953.

Lastly, it must be noted that Texas' invocation of *Harrington v. Richter*, 131 S.Ct. 770 (2011) is misplaced. Texas Amicus Brief 6. Texas mistakenly believes the *Richter* rule of deference to silent decisions also applies to explicated state court decisions. *Id.* at 6. By its terms, *Richter* only applies to a state court's "summary rulings" or a "decision...unaccompanied by explanation" from state collateral proceedings. 131 S.Ct. at 784-85. As this Court explained in *Wetzel v. Lambert*, 132 S.Ct. 1195, 1199 (2012) and *Parker v. Matthews*, 132 S.Ct. 2148, 2151-2 (2012), an

---

v. Price, 343 F.3d 223, 229 (3d Cir. 2003); *Booth-El v. Nuth*, 288 F.3d 571, 575-76 (4th Cir. 2002); *Penry v. Johnson*, 215 F.3d 504, 508 (5th Cir. 2000), *aff'd in part, rev'd in part*, 532 U.S. 782 (2001); *Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001); *Armstrong v. Bertrand*, 336 F.3d 620, 624 (7th Cir. 2003); *Carter v. Kemna*, 255 F.3d 589, 592 (8th Cir. 2001); *Miller v. Blackletter*, 525 F.3d 890, 895-96 (9th Cir. 2008); *Parker v. Scott*, 394 F.3d 1302, 1308 (10th Cir. 2005); *Kimbrough v. Secretary, DOC*, 565 F.3d 796, 799 (11th Cir. 2009).

unreasonable explicated decision can form the basis of habeas relief provided no stated alternative grounds are found to be reasonable.

B. This Court's precedent clearly establishes the Fifth Amendment right to a no-adverse-inference instruction in a capital sentencing trial.

This Court held that the Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). This Court endorsed this principle in *Estelle v. Smith*, 451 U.S. 454, 467 (1981).

The privilege against self-incrimination guarantees every criminal defendant the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Fifth Amendment privilege is applicable against the states through the Fourteenth Amendment. *See id.* at 6. This Court has construed the privilege "broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom." *In re Gault*, 387 U.S. 1, 50 (1967). In *Gault*, this Court rejected attempts to deny Fifth Amendment protections to juvenile proceedings because "the availability of the [Fifth Amendment] does not turn upon the type of proceeding in which its protection is invoked." *Id.* at 49.

In *Griffin v. California*, 380 U.S. 609, 615 (1965), this Court held that the guarantee against self-incrimination

includes a protection against comment by the prosecution on a defendant's silence, as well as jury instructions that a defendant's silence is not evidence of guilt. *Griffin*, which involved a capital trial, "stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify." *Carter*, 450 U.S. at 301.

In *Lakeside v. Oregon*, 435 U.S. 333 (1978), this Court ruled that over a defendant's objection, the state could request and receive a no-adverse-inference instruction. The instruction protects against the inherent compulsion that exists when adverse inferences are drawn from a defendant's failure to take the witness stand. *Id.* at 339.

1. *Carter*: a no-adverse-inference instruction must be given if requested by a defendant.

Following *Lakeside*, in *Carter* (a non-capital case), the Court held that "a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify" by giving a no-adverse-inference instruction. *Carter*, 450 U.S. at 305. The Court explained:

> The *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify. The penalty was exacted in *Griffin* by adverse comment on the defendant's silence; the penalty may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence

> broad inferences of guilt . . . A trial judge has a powerful tool at his disposal to protect the constitutional privilege-the jury instruction-and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum. Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence.

Id. at 301, 303. Failure to grant the instruction "exacts an impermissible toll on the full and free exercise of the [Fifth Amendment] privilege." *Id.* at 305.

2. *Estelle*: the Fifth Amendment applies to a capital sentencing phase even after a jury's guilt finding.

Two months after *Carter*, this Court decided the capital case of *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the defendant was compelled to undergo a pre-trial psychiatric examination. During the penalty phase, the prosecution called an examining doctor to testify to the defendant's future dangerousness which the state had to establish to obtain a death sentence. *Id.* at 468. The Court held that the protection of the Fifth Amendment extends to a capital trial's penalty phase due to the gravity of "the ultimate penalty of death." *Id.* at 462-63.

Estelle rejected the State's argument that the privilege against self-incrimination is extinguished "once guilt has been adjudicated." *Id.* at 462. "We can discern no basis to distinguish between guilt and penalty phases of [a defendant's] capital murder trial so far as the protection of the Fifth Amendment is concerned." *Id.* at 462-63. This Court concluded, "Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." *Id.* at 463.

Petitioner asserts that this holding of *Estelle* is dicta. Pet. Br. 26. However, this Court's conclusion that the Fifth Amendment applies to capital sentencing proceedings was an essential basis of the ruling. *See Estelle*, at 461 ("Our initial inquiry must be whether the Fifth Amendment privilege is applicable in the circumstances of this case."). *Accord Buchanan v. Kentucky*, 483 U.S. 402, 421 (1987) (describing the preceding holding in *Estelle* as "noting that the Fifth Amendment was applicable in a capital sentencing hearing"). This Court's holdings of course include the final disposition of a case as well as the preceding determinations "necessary to that result." *Seminole Tribe of Fla.*, 517 U.S. at 67.

Petitioner also asserts that this Court in *Penry v. Johnson*, 532 U.S. 782, 795 (2001) restricted *Estelle*. Pet. Br. 31. This overstates the significance of *Penry*. *Penry* held Texas did not violate AEDPA on consideration of a question specifically left open in *Estelle*. 532 U.S. at 795. *Estelle* did not decide whether the Fifth Amendment protected a defendant who put his own mental state at issue. *Penry* did not disturb the essential basis of *Estelle* that there is "no basis to distinguish between the guilt

and penalty phases of [a] capital murder trial so far as the protection of the Fifth Amendment is concerned." *Estelle*, at 462-3.[3]

3. *Mitchell*: a guilty plea does not waive Fifth Amendment rights at a subsequent sentencing proceeding, and no adverse inference may be raised by a defendant's exercise of his right not to testify.

Mitchell v. United States, 526 U.S. 314 (1999) eliminated any possible distinction between *Estelle*, in which the defendant was incriminated by his own statement, and *Griffin* and *Carter*, in which the defendants exercised their right not to testify. Mitchell pled guilty to federal drug charges without a plea agreement, but reserved the right at sentencing to contest the quantity of drugs, which had a direct bearing upon her minimum sentence. *Id.* at 317. As a consequence of her guilty plea, the judge ruled Mitchell had no right to remain silent: "'I held it against you that you didn't come forward today and tell me that you really only did this a couple of times . . . I'm taking the position that you should come forward and explain your side of this issue.'" *Id.* at 319.[4]

---

3. In *Beathard v. State*, 767 S.W.2d 423, 431-2 (Tex. Cr. App. 1989), the Texas Court of Criminal Appeals specifically noted that its *Penry* decision was limited to psychiatric sanity examinations, which had no bearing or effect upon the entitlement to a *Carter* instruction under the Fifth Amendment at Beathard's capital sentencing trial.

4. This ruling mirrored the trial court's denial of a *Carter* instruction because the trial court indicated that Woodall would have to "offer testimony," "an explanation," "ask for forgiveness" or offer "remorse." JA 38. The trial court felt the jury could consider all of the above. *Id.*

This Court addressed two questions in *Mitchell*. First, whether a guilty plea waives the privilege in the sentencing phase, either as a result of the colloquy preceding the plea or by operation of law when the plea is entered. *Id.* at 316. Second, whether, in the course of determining facts bearing upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence. *Id.* at 317.

Mitchell decisively answered the first "guilty plea" question: a "plea is not a waiver of the privilege at sentencing." *Id.* at 316. This Court acknowledged the well-established principle from *Estelle* that in a bifurcated proceeding, the Fifth Amendment right against self-incrimination survives even though guilt has already been determined. *Id.* at 325 (*citing Estelle*, 451 U.S. at 462).

Addressing the second question, the Court recognized that while there is no basis for invoking the privilege "where there can be no further incrimination," this principle is limited "to cases in which the sentence has been fixed and the judgment of conviction has become final." *Mitchell*, 526 U.S. at 314. The Court explained:

> Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony. As the Court stated in *Estelle:* "Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." 451 U.S., at 463..."The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an

> individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.' " *Id.*, at 462, (emphasis in original) (*quoting Culombe v. Connecticut*, 367 U.S. 568, 581-582 (1961)) . . . [I]t appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her punishment. Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime. To say that she had no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important.

Id. at 329-30. The Court declined to deviate from what it characterized as a broad rule:

> The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted. *Griffin v. California*, 380 U.S. 609, 614 [] (1965). We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime.

Id. at 327-8. *Mitchell* held that a defendant, even after a plea, should not be forced to be an "unwilling instrument of his or her own condemnation." *Id.* at 329.

C. The Kentucky Supreme Court's decision unreasonably applied these precedents.

The Fifth Amendment applies at a capital sentencing. *Estelle*, 451 U.S. at 462-3. Because he contested the appropriate sentence, Woodall's Fifth Amendment right survived his guilty plea. *Mitchell*, 526 U.S. at 327. A sentencing fact-finder is not permitted to draw adverse inferences from a defendant's silence. *Mitchell*, at 329-30. Indeed, the Commonwealth could not have compelled Woodall to testify against his will. *Estelle*, at 454. The trial court colloquied Woodall regarding the exercise of his right not to testify. Woodall requested a *Carter* instruction to prevent any adverse inferences from his silence. Once requested it should have issued. *Carter*, 450 U.S. at 305.

Instead of heeding *Estelle*'s and *Mitchell*'s commands that the Fifth Amendment applies to sentencing proceedings, and that a defendant is entitled to a *Carter* instruction when requested, the Kentucky Supreme Court did not recognize the Fifth Amendment's applicability to capital sentencing proceedings when there is a guilty plea. When a state court contravenes the "fundamental principles established" or categorical rules by this Court's "most relevant precedents," it unreasonably applies the law within the meaning of 28 U.S.C. § 2254(d). *Abdul-Kabir*, 550 U.S. at 258. In capital cases, multiple state courts have found *Carter* applicable to sentencing

proceedings.[5] Those few federal circuit courts to address it have followed suit.[6] Kentucky is an outlier.

1. The Kentucky Supreme Court unreasonably ruled that a guilty plea eliminated any Fifth Amendment protection.

The Kentucky Supreme Court's ruling that a guilty plea eliminated any Fifth Amendment protection ignores the clear lesson of *Mitchell*. The Kentucky Supreme Court rejected *Carter's* applicability on the basis that Woodall had pled guilty. Pet. App. 262a. According to the Kentucky Supreme Court, Woodall's guilty plea ended the inquiry. *Id.; see* Pet. Br. 30. The court also rejected the applicability of *Estelle* for the same reason. *Id.* However, *Estelle* applied the Fifth Amendment to a sentencing phase without distinguishing between guilt from a plea or a jury finding. 451 U.S. at 463.

While *Estelle* alone proves that Woodall maintained his Fifth Amendment rights at his post-plea capital sentencing, this Court in *Mitchell* pointedly ruled that a "plea is not a waiver of the privilege at sentencing." 526

---

5. *People v. Leonard*, 40 Cal.4th 1370, 1424-25 (Cal. 2007); *Burns v. State*, 699 So.2d 646, 652 (Fla. 1997); *People v. Ramirez*, 457 N.E.2d 31, 35-37 (Ill. 1983); *State v. Edwards*, 116 S.W.3d 511, 540 (Mo. 2003); *State v. Munn*, 56 S.W.3d 486, 502 (Tenn. 2001); *State v. Middleton*, 368 S.E.2d 457, 461 (S.C. 1988); *Beathard v. State*, 767 S.W.2d 423, 431-2 (Tex. Cr. App. 1989).

6. *United States v. Whitten*, 610 F.3d 168, 198-200 (2nd Cir. 2010) (reversing federal death sentence on basis of *Carter* and *Griffin* errors at sentencing phase); *Middleton v. Evatt*, 1996 U.S. App. LEXIS 2181, *26-30 (4th Cir. 1996) (recognizing *Carter's* applicability to state capital sentencing proceeding).

U.S. at 316. *Mitchell* also recognized that "[t]reating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants." *Id.* at 324. *Mitchell* firmly ruled that "[t]o maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327. The Kentucky Supreme Court made the same error that the Third Circuit did in *Mitchell*. It carved out an exception to the Fifth Amendment. As a dissenting Justice of the Kentucky Supreme Court noted, the court simply failed to give effect to the "the plain language of *Mitchell*." Pet. App. 310a.

2. The Kentucky Supreme Court's decision unreasonably limited *Estelle* because it was not a jury instruction case.

The Kentucky Supreme Court also found that *Estelle* did not apply because it was not a jury instruction case like *Carter*. Pet. App. 262a. However, *Carter* recognized that the foundation for the right to a no-adverse-inference instruction upon request is the Fifth Amendment. 450 U.S. at 303. And both *Estelle* and *Mitchell* found that a defendant who has been found guilty, but has yet to be sentenced, retains Fifth Amendment protections. *Estelle*, at 462-63; *Mitchell*, at 329.

Estelle flatly rejected that Fifth Amendment protections did not apply to capital sentencing proceedings because there was "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462-3. Thus, it is untenable that the protection of *Carter*, which was

decided two months before *Estelle,* would not be included in those Fifth Amendment protections applicable at a capital sentencing trial. Indeed, this Court rejected the government's similar attempt to limit the Fifth Amendment privilege at federal sentencing in *Mitchell.* "[T]o say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle.*" *Mitchell,* 526 at 329.

3. The Kentucky Supreme Court's decision unreasonably required compelled testimony before *Estelle* applied.

The Kentucky Supreme Court held that Fifth Amendment protection does not extend to the penalty phase of a capital trial unless the defendant was compelled to testify, "as in *Estelle.*" 262a; *see* Pet. Br. 27, 30. This conclusion unreasonably limits this Court's precedent. *Mitchell* held the Fifth Amendment privilege in the sentencing phase of "any criminal case" is not limited to instances in which the defendant was compelled to testify at trial and includes a protection against a trial court drawing an adverse inference from the defendant's silence. *Mitchell,* 526 U.S. at 329.

The Kentucky Supreme Court's opinion unreasonably applied this Court's authority by parsing it too finely. Unquestionably, *Griffin* prohibited *both* improper arguments and improper instruction. 380 U.S. at 610, 615. By the time *Estelle* was decided, this Court had issued *Lakeside, Griffin,* and *Carter* all of which bore on instructions related to inferences from the failure to testify. Moreover, in *Estelle,* this Court cited *Griffin,* noting

the importance of the reliability of capital sentencing proceedings. *Estelle*, 451 U.S. at 462-3. Furthermore, the Kentucky Supreme Court missed *Carter's* core reasoning. *Carter* reasoned that a trial judge has the "constitutional obligation to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Carter*, 450 U.S. at 303. Nowhere is that weight more significant than in a capital sentencing. *Estelle*, at 462-3.

4. The Kentucky Supreme Court unreasonably ruled that this Court's precedents did not apply, because no facts were in dispute when the Commonwealth had to establish beyond a reasonable doubt that death was the appropriate sentence.

The Kentucky Supreme Court asserted that the Fifth Amendment did not apply to Woodall's penalty phase because he failed to contest any facts. Pet App. 262a-263a. Petitioner similarly argues that this lack of a factual contest at the penalty proceeding ends the matter. Pet. Br. 31; *Id.* at 22, 23, 30. The facts demonstrate otherwise. And the court's reasoning proves internally inconsistent because the court also recognized "in circumstances where there is a guilty plea, the Commonwealth still has the burden of proving ... *that there is a basis for the death penalty.* It may introduce any relative and probative evidence necessary." Pet App. 298a (emphasis added).

One of the jury instructions given elucidates the contested issues under Kentucky law. Under Instruction #6, even if the jurors found Woodall guilty of an aggravating circumstance, his life was required to be spared, unless after considering the whole of the case,

every juror decided beyond a reasonable doubt that death was the appropriate penalty. JA 44. Petitioner argues that Woodall was not entitled to Instruction #6, and thus received a benefit to which he was not entitled. *See* Pet. Br. 36. This misapprehends Kentucky's law at the time of Woodall's trial.

Well after Woodall's trial, the Kentucky Supreme Court changed the burden of proof of its capital-sentencing jury instruction. *Brown v. Commonwealth*, 313 S.W.3d 577, 594 n.2 (Ky. 2010). However, *Brown* recognized that Woodall's Instruction #6 was the long-standing pattern instruction. *Id.* In *Parrish v. Commonwealth*, 121 S.W.3d 198, 207 (Ky. 2003), the Kentucky Supreme Court held this instruction "do[es] not violate the statutory system [and is] a proper statement of the law." The instruction was cited with approval in other capital cases. *See Purdue v. Commonwealth*, 916 S.W.2d 148, 168 (Ky. 1995); *Skaggs v. Commonwealth*, 803 S.W.2d 573, 575 (Ky. 1990).

Further, Petitioner avoids considering the *actual* instruction provided Woodall's jury. *See* Pet. Br. 36. Just like the jury instructions required a finding of the elements of the crime in *Carter*, the determination of the future dangerousness special circumstance question in *Estelle*, and the finding of the amount of drugs in *Mitchell*, Woodall's jury needed to find *beyond a reasonable doubt* whether Woodall should die.

Petitioner misinterprets *Mitchell* to argue that the protection of the Fifth Amendment privilege is limited to the "facts of the crime." Pet.Br. 32-33. Doing so, Petitioner disregards *Estelle* where this Court held the Fifth Amendment applied in the capital penalty phase

when a defendant's unwarned statement was used to prove his future dangerousness. Future dangerousness is a characteristic of the defendant, not a fact of the crime.

Moreover, circumstances of the crime were certainly at play in the jury's decision whether Woodall would live or die. Woodall's guilty plea did not determine *every* fact upon which the Commonwealth would rely in his effort to secure death.[7] At trial, over objection, the prosecutor, through the testimony of the blood spatter expert, sought to convince the jury that the crime occurred in a salacious and therefore more aggravated manner.

Certainly, the jurors were free to weigh the theorized details of the crime proffered by the prosecutor. They were also free to weigh lack of remorse as a non-statutory aggravator. Petitioner concedes that the prosecutor affirmatively pursued lack of remorse. Pet. Br. 40, 45. The state thus admits that it sought the death penalty on an aggravating ground on which Woodall exercised his right not to testify.

Estelle recognized the "the gravity of the decision" to be made at a capital penalty trial. 451 U.S. at 463. *Estelle* relied on this Court's capital jurisprudence. *Id.*, *citing Green v. Georgia*, 442 U.S. 95, 97, (1979); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *Gardner v. Florida*, 430 U.S. 349, 357–358 (1977) (plurality opinion). This Court said that at a capital sentencing "the State is not relieved

---

7. Kentucky is a non-weighing state. *Ice v. Commonwealth*, 667 S.W.2d 671, 679 (Ky. 1984); *Stringer v. Black*, 502 U.S. 222, 229 (1992). The jury may consider in aggravation more than the statutory aggravating factors. *Brown v. Sanders*, 546 U.S. 212, 217 (2006).

of the obligation to observe fundamental constitutional guarantees." *Estelle*, at 463. Similarly, this Court has also said that a death sentence based on an aggravating factor that "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected" is invalid. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983) (citing *United States v. Jackson*, 390 U.S. 570 (1968)). Unmistakably, as recognized by *Estelle*, constitutionally protected conduct, in this case Woodall's exercise of his right not to testify, cannot be considered in a capital sentencing.

Here, the jury was able to consider Woodall's lack of testimony as to all the facts that were at issue. As more fully explained *infra*, the jury's natural inclination was to expect testimony from Woodall. When the trial court deprived the jurors of the no-adverse-inference instruction, this left them free to punish Woodall for what he did not provide, and it lessened the state's burden as to any facts at issue. This allowed a death verdict to be based on jurors' natural (but constitutionally impermissible) expectations rather than on reliable facts.

Petitioner seeks to exempt remorse from this case. Pet. Br. 29. Petitioner however, misreads *Mitchell*.[8] *Mitchell* did not leave open, as Petitioner contends, the question of whether silence bears upon lack of remorse as it pertains to a capital sentencing proceeding. *Mitchell* rather left open the question of whether a convicted

8. Petitioner misquotes *Mitchell* regarding the "separate question" left unanswered by cutting the Sentencing Guidelines language from the quote without the use of an ellipse. Pet. Br. 29. While doing so makes *Mitchell* appear more helpful to Petitioner's argument, the misquotation alters the meaning of the opinion. *See Mitchell*, at 330.

defendant has Fifth Amendment protections with respect to the federal sentencing guidelines remorse/acceptance of responsibility downward departure. 526 U.S. at 330. Under USSG § 3E1.1, a defendant bears the burden of proving a sentencing range reduction. It is a benefit to a defendant, not an enhancement, and comes after the statutory fixing of the proper sentencing range, and is only a contested issue if the defendant makes it so. Federal Sentencing Guidelines Manual, Chap. 3, Part E (2013-14).

Indeed, *Mitchell* would have played out in identical fashion if the sentencing range increase had been for lack of remorse rather than a quantity of cocaine. When the burden is on the prosecution, the Fifth Amendment applies and the prosecutor cannot meet his burden by utilizing a defendant's silence. Here, the prosecution affirmatively tried to prove the non-statutory aggravator of lack of remorse to carry its burden under Instruction #6.

Petitioner next argues that because the Commonwealth had no burden as to mitigation, the mitigation cannot fall into the purview of the no-adverse-inference instruction. Pet. Br. 37. Petitioner then concludes that Woodall's silence in this area could not have been used to relieve the prosecution from its burden of proof or subject Woodall to a harsher sentence. *Id.* This misapprehends the nature of the trial and disregards the Kentucky Supreme Court's express statement that the Commonwealth bore the burden to prove the death penalty. Pet. App. 298a. Facts were at issue. Here, the prosecution had a legal burden to prove that death was the appropriate punishment. JA 44. To that end, the prosecution's thorough cross-examination contested virtually each aspect of the mitigation case presented by Woodall.

The record does not disclose why Woodall did not testify. As *Carter* recognized there are numerous reasonable reasons any person may not want to testify. 450 U.S. at 300 n. 15 (timidity, nervousness, embarrassment, fear of impeachment, protection of others). Woodall's at best borderline retardation provides a likely reason he did not testify.[9] This Court has recognized:

> Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins v. Virgina, 536 U.S. 304, 320-21 (2002). Thus, while Woodall may have wanted to express remorse (or to explain his actions, or to confirm his deleterious upbringing), he likely only could have done so at the risk of undermining or, worse, achieving the opposite of this goal.

The denial of this instruction assured that Woodall's death sentence was not merely a product of what had occurred in the courtroom. As this Court has said:

> An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United

---

9. Woodall's 74 IQ places him within the range of mental retardation considering the standard error of measurement. Am. Ass'n of Intellectual and Developmental Disabilities, Intellectual Disability: Definitions, Classification, and Systems of Supports (11th ed. 2010) at p. 35.

> States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." Indeed, by limiting the jury's sentencing considerations to record evidence, the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process.

California v. Brown, 479 U.S. 538, 543 (1987) (citations omitted).

The necessity for a *Carter* instruction is plain. Like the defendant in *Mitchell*, as Woodall entered the penalty trial he had a legitimate fear of adverse consequences from his silence. *Mitchell* 526 U.S. at 326. As in *Mitchell*, the stakes were high. While for Mitchell the adverse inference from silence may have resulted in additional years of punishment, for Woodall the inference may have resulted in a death sentence. *See id.* at 329. As this Court stated in *Mills v. Maryland*, 486 U.S. 367, 383-384 (1988), the decision to "execute a defendant is unlike any other decision citizens and public officials" make, and there is "a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."

In summation, Kentucky's refusal to permit Woodall's requested *Carter* instruction contravenes the "fundamental principles established" by this Court's "most relevant precedents," and thus, it unreasonably applied the law within the meaning of 28 U.S.C. § 2254(d)(1). *Abdul-Kabir*, 550 U.S. at 258. Indeed, this Court has never excluded the Fifth Amendment's protections based upon the type of proceeding in which it is invoked. *Estelle*, 451 U.S. at 462; *Gault*, 387 U.S. at 49. To the contrary, this Court has historically ruled that the Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard." *Counselman*, 142 U.S. at 562.

5. Petitioner's further arguments do not otherwise prove the correctness of the Kentucky Supreme Court's decision.

Petitioner proffers further reasons why the Kentucky Supreme Court's decision was correct. Because these reasons were not the basis of the Kentucky Supreme Court's explicated decision, they are not proper considerations under AEDPA. *See Wetzel*, 132 S.Ct. at 1199; *Parker*, 132 S.Ct. 2151-2. Upon *de novo* view, they also fail.

Petitioner states that this Court has never applied the Fifth Amendment to a pure sentencing issue. Pet. Br. 32. This is not the case. The issue of future dangerousness in *Estelle* was, at that time, the principal vehicle of the Texas death penalty statute for the consideration of aggravation and mitigation. *Jurek v. Texas*, 428 U.S. 262, 272-274 (1976). Petitioner mistakenly believes that Texas' future dangerousness question is an eligibility factor. Pet. Br. 26. However, under Texas law, it was a selection

question. *Jurek v. State*, 522 S.W.2d 934, 939-940 (1975). *Accord Lowenfeld v. Phelps*, 484 U.S. 231, 245 (1988) (discussing Texas' questions as selection factors). Texas' future dangerousness question is no different, for present purposes, than Woodall's Instruction #6. Both require the State to prove its case beyond a reasonable doubt.

Petitioner also insists that Woodall is not entitled to any Fifth Amendment protection because neither the judge nor prosecutor told the jury it could draw an adverse inference from Woodall's silence. Pet. Br. 31. However, *Carter* recognized an independent Fifth Amendment violation "even without comment." 405 U.S. at 303.

Petitioner also wrongly accuses the Sixth Circuit of creating new law. Pet. Br. 37-39. But where clearly established Supreme Court law consists of a principle that owes its origin to more than one case, it does not necessarily break new legal ground or impose new obligations. This Court noted in *Yarborough v. Alvarado*, that "[w]hile the difference between applying a rule and extending it is not always clear. Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." 541 U.S. 652, 666 (2004).

In *Mitchell* this Court noted, "Our holding today is a product of existing precedent . . . Although *Estelle* was a capital case, its reasoning applies with full force here." *Mitchell*, 526 U.S. at 329. *Mitchell*, a federal sentencing guidelines case, did not purport to modify or undermine *Carter's* or *Estelle's* holdings. It embraced them. The rule Petitioner favors would prohibit adverse inferences in non-capital federal sentencing proceedings (based ironically on *Estelle*, a capital case) but allow such inferences in capital sentencing proceedings (now ignoring the decision).

The Sixth Circuit did not take a narrow principle and enlarge it to reach a novel situation; nor did it extend established principles to a new situation. Nor did it take a general, high discretionary rule, and reject a state court's application of that rule. Rather, it simply found, as did this Court in *Mitchell*, that this Court's Fifth Amendment reasoning "applies with full force here." Consequently, it found unreasonable a state court's unwarranted restriction of this Court's well-established Fifth Amendment protections and concluded AEDPA does not permit a state court to contravene this Court's precedent, or to create exceptions to it.

The only reasonable conclusion from *Carter*, *Estelle* and *Mitchell* is that at the time of Woodall's trial, a defendant in a sentencing proceeding, capital or non-capital, in which the government retains the burden of proving facts relevant to a contested issue, possessed a Fifth Amendment right to a no-adverse-inference instruction upon request, regardless of whether guilt has previously been established through a plea agreement. As such, the Sixth Circuit's finding of unreasonableness was entirely correct.

II. The Fifth Amendment error had substantial and injurious effect.

A. The Sixth Circuit correctly applied the *Brecht* and *O'Neal* standards.

The Sixth Circuit, having found a Fifth Amendment violation, followed this Court's directives and applied the harmless error test of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Pet. App. 9a. *Brecht* requires a reviewing court to consider, "in light of the record as a whole," whether the

error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 638.

In applying *Brecht*, the Sixth Circuit correctly found that it could not answer the prejudice question with absolute certitude. Pet. App. 10a-12a. Because of this, the court then applied this Court's standard set forth in *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995). When the *Brecht* analysis yields "grave doubt" about whether the constitutional violation affected the verdict, the defendant must prevail. *Id.*; *accord Fry v. Pliler*, 551 U.S. 112, 121 n. 3 (2007).

1. The Sixth Circuit did not deviate from *Brecht* and *O'Neal*.

Assessing prejudice necessarily requires some element of speculation. Indeed, this Court has faulted a state court for citing the need to avoid speculation as justification for its failure to apply the applicable standard of review. *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010) (State court ruled it could not "speculate" as to what the effect of additional evidence would have been because *Strickland v. Washington*, 466 U.S. 668 (1984) "will necessarily require a court to 'speculate' as to the effect of the new evidence."). Similarly, an instructional omission requires a court to surmise the effect of its absence. Here, the Sixth Circuit correctly followed this Court's guidance in *Brecht* and *O'Neal*.

Petitioner claims that the Sixth Circuit engaged in "possible-harm review." Pet. Br. 46-48. However, the Sixth Circuit's analysis began with the following language from *Carter*: "[I]t is arguable that a refusal to give an

instruction similar to the one that was requested here can never be harmless." Pet. App. 9a (*citing Carter*, 450 U.S. at 304). *Carter* recognized the mischief attendant to a jury's natural inclination when a defendant does not testify. 450 U.S. at 304. This Court has also recognized this natural mischief previous to *Carter*. *See also Lakeside*, 435 U.S. at 340; *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-154 (1923). It was thus logical for the Sixth Circuit to rely on *Carter* as a starting point to measure the harm. *See* Pet. App. 9a. Indeed, the Sixth Circuit would have been remiss if it ignored this Court's most relevant pronouncement on the prejudice from this error.

The policies underlying *Carter* are important, here, because Kentucky is a non-weighing state. *See* FN 5, *supra*. The jury's sentencing decision was not confined to consideration of specific statutory aggravators. *Id.* Without the instruction, however, the jury could consider Woodall's constitutionally protected conduct as a basis to impose death. The Sixth Circuit recognized this:

> Given our grave doubt that the jury's recommendation was not influenced by adverse inferences drawn from Woodall's decision not to testify, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."

Pet. App. 11a (citing *O'Neal*, at 437).

Lastly, this Court's emphasis on the importance of reliability at sentencing also illustrates why the Sixth

Circuit's application of *Brecht* then *O'Neal* rule was appropriate. While the record here contains bad facts, bad facts do not always result in death verdicts.[10] Moreover, in Kentucky, the penalty decision must be unanimous. Pet. App. 266a. It only takes one juror to hang a jury and prevent a death sentence. *Id.* Therefore, even a slight rebalancing of the proceedings might affect the verdict. Eliminating the jury's powerful natural inclination for an explanation from Woodall is not a slight rebalancing. It removes altogether an improper consideration, which lessened the state's burden to secure a death sentence.

2. Jurors will hold silence against a defendant unless instructed otherwise.

Carter recognized that a no-adverse-inference instruction is necessary so jurors will not "roam" and hold a defendant's silence against him. *Carter*, 450 U.S. at 301. People naturally want to hear an explanation from an accused wrongdoer. *Lakeside*, 435 U.S. at 340. Indeed, the no-adverse-inference rule "runs exactly counter to normal evidentiary inferences: If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear." *Mitchell*, 526 U.S. at 332 (Scalia, J., dissenting). As this Court has said,

---

10. *See Ballard v. Commonwealth*, 2012 WL 601215 (Ky. 2012) (jury recommended life without parole for formerly convicted pedophile who sodomized and bludgeoned to death a 6-year-old); *Cross v. Commonwealth*, 2009 WL 4251649 (Ky. 2010) (jury recommended life without parole for defendant who strangled a woman and forced others to engage in sexual activity with her corpse); *Jackson v. Commonwealth*, 392 S.W.3d 907 (Ky. 2013) (jury recommended life without parole for defendant who committed a triple infanticide by arson).

"Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." *Bilokumsky*, 263 U.S. at 153-154.

This Court also described how the law has long acknowledged that the unfettered citizen naturally draws inferences from a man's silence:

> It has often been noted that such inferences [from silence] may be inevitable. Jeremy Bentham wrote more than 150 years ago: "[B]etween delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable." 5 J. Bentham, *Rationale of Judicial Evidence 209* (1827). And Wigmore, among many others, made the same point: "What inference does a plea of privilege support? The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." 8 J. Wigmore, *Evidence* § 2272, p. 426 (McNaughton rev. 1961).

Lakeside, 435 U.S. at 340, fn. 10. This Court has found "dubious" the assumption that during a trial "the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own." *Id.* at 340.

Further, the jury will likely have required an explanation from Woodall based on narrative theory principles this Court has recognized. This Court explored these principles in *Old Chief v. United States*, 519 U.S. 172

(1997). Such principles show why the harm discussed in *Carter, Lakeside*, and *Bilokumsky* arises.

In *Old Chief*, this Court held that a prosecutor is not precluded from presenting evidence that proves her case when a defendant has conceded to facts that establish one of the elements. *Id.* at 187-188. This Court stated:

> Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.

Id. Jurors come to the courthouse with expectations about what "proper proof should be." *Id.* at 188. "If suddenly

the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, 'never mind what's behind the door,' and jurors may well wonder what they are being kept from knowing." *Id.* at 188. This Court in *Old Chief* recognized:

> The assumption that jurors may have contrary expectations and be moved to draw adverse inferences against the party who disappoints them undergirds the rule that a defendant can demand an instruction forbidding the jury to draw such an inference.

519 U.S. at 189, fn. 9.[11]

Here, the Commonwealth and Woodall were telling competing stories as to the punishment. In the same way that in *Old Chief* a prosecutor's reliance on a stipulation would cause jurors to wonder what they are being kept from knowing, so did Woodall's silence alert the jurors to speculate what was "behind the closed door." *Old Chief*, 519

---

11. In *Old Chief*, this Court cited with approval a law review article by Stephen A. Saltzburg. *Id.* at 188-189 (citing Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 Cal. L. Rev. 1011 (1978)). Saltzburg argues that in making rulings, trial judges should consider jurors' inferences from the absence of evidence. Saltzburg at 1011. Negative inferences are "inferences drawn by factfinders from the absence of one or more pieces of evidence that they expect to be presented." *Id.* Saltzburg's states that "[i]f their expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." *Id.* at 1019.

U.S. at 188. Without the requested instruction, Woodall's lack of testimony diminished the impact of his mitigation narrative. More injuriously, it enhanced the impact of the story the Commonwealth was telling in aggravation.

The natural inclination to expect an answer from a defendant is heightened in the context of a capital sentencing proceeding. Here, the Sixth Circuit was correct when it found that the jury naturally would have wanted testimony from Woodall. The court relied on the very words of the judge who presided over the trial:

> [T]he trial court itself appears to have drawn an adverse inference from Woodall's decision not to testify: in denying the requested instruction, the trial court stated that it was "aware of no case law that precludes the jury from considering the defendant's lack of explanation of remorse or explanation of the crime or anything else once guilt has been adjudged in sentencing." The trial court's own inferences illustrate our concern. Given our grave doubt that the jury's recommendation was not influenced by adverse inferences drawn from Woodall's decision not to testify, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *O'Neal*, 513 U.S. at 437 [] (internal quotation marks omitted).

Pet. App. 11a.

The Sixth Circuit's core holding is firmly rooted in this Court's authority regarding the obvious dangers in not providing an instruction. *Lakeside*, 435 U.S. at 340; *Old Chief*, 519 U.S. at 189 n. 9. Given this, the Sixth Circuit quite correctly had "grave doubt" as to whether the jury considered Woodall's failure to testify and used it against him. Woodall was penalized for asserting a constitutional protection, and it formed a basis of his death sentence.[12]

3. The jury would have wanted to hear Woodall express remorse.

The Fifth Amendment prohibits a prosecutor from establishing lack of remorse from a defendant's failure to testify. In *Estelle*, the defendant's lack of remorse was a factor in the psychologist's future dangerousness finding. *Id.* at 459-460. The circumstances of *Woodall* are logically indistinct: the prosecution used Woodall's silence as evidence of lack of remorse. To justify the death sentence, the prosecutor sought to prove the non-statutory aggravator of lack of remorse. Petitioner acknowledges remorse was at issue. Pet. Br. 40, 45.

---

12. The *Amicus* of Arizona and Other States suggests that providing a *Carter* instruction will cause confusion and corrupt deliberations by hurting the state's ability to prove its case. Arizona Amicus Brief 11-18. However, the logic of *Carter*, *Lakeside*, and *Old Chief* illustrate that the only person who is hurt when they do not give testimony is the person not testifying. *Lakeside* found that the *Carter* instruction cured the only harm possible here: that the defendant's silence would be held against him. *Lakeside*, 435 U.S. at 339. Jurors are also presumed to follow their instructions. *Id.* The only harm to the state is they do not receive the benefit of a negative inference, which they are not entitled to anyway.

To meet his burden, the prosecutor was entitled to argue non-statutory aggravation, such as a defendant's courtroom demeanor and its bearing on lack of remorse. *See Fields v. Commonwealth*, 274 S.W.3d 375, 416-417 (Ky. 2008) *overruled on other grounds Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010). The prosecutor designed his closing to convince the jury that Woodall had expressed no remorse and had not accepted responsibility. TE 1598-99. The prosecutor ascribed a motive of fakery to Woodall's in-court demeanor of quietly keeping his head down:

> You've heard everyone talk...everyone talk about their observations of the defendant. How many of those have told you that he's got a habit of sitting around looking down like this for a week at a time? Don't be fooled. Don't be fooled by that.

JA 58. The prosecutor directly confronted Woodall's demeanor, and Woodall's demeanor was his silence. The prosecutor also emphasized Woodall's post-crime behavior as lack of remorse. JA 60-1.

In the absence of a no-adverse-inference instruction, the prosecutor's comments served the purpose of focusing the jury's attention on Woodall's lack of testimony. Because jurors want testimony, an otherwise proper prosecutorial comment can compound the prejudice from the error of not giving a *Carter* instruction. *See State v. Mayes*, 63 S.W.3d 615, 638, fn. 13 (Mo. 2001). Moreover, even if the prosecutor had not purposefully implied that Woodall lacked remorse, the jury would have held Woodall's silence against him anyway. *Lakeside*, 435 U.S. at 340. The lack

of the instruction assisted the Commonwealth in its case that Woodall was "evil" and remorseless. JA 51, 61.

Woodall pled guilty to the crime, which showed he accepted responsibility. Woodall also was a model prisoner in the jail, which showed lack of future danger. He also looked down while in court, which showed enough contrition for the prosecutor to feel he had to comment on it. A survey of capital juries also indicates that Woodall's decision to accept responsibility increased his odds of avoiding a death verdict. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1589-1592 (1998). "Jurors tend to react favorably to actions or strategies that communicate some acknowledgment of the defendant's responsibility for the crime." *Id.* at 1589.

Woodall attempted to hold the Commonwealth to its sentencing burden. He, undoubtedly with the guidance of his attorneys, made the decision not to take the stand. Woodall, given his intellectual and personality limitations, was not likely to make a good witness on remorse. Yet the jury would have wanted to hear him offer remorse. When he did not provide this, the jury would have held it against him. The lack of the instruction unduly aided the Commonwealth in this contest. *Carter*, 450 U.S. at 301; *Old Chief*, 519 U.S. at 189 n. 9.

4. The jury would have wanted an explanation from Woodall for his conduct.

The prosecution had a burden to justify a death sentence beyond a reasonable doubt. Pet. App. 298a. To help carry this burden, the Commonwealth used a blood

spatter expert to put in front of the jury theories related to the commission of the crime. TE 1274-1284. In closing, the prosecutor stated as fact that Ms. Hansen was alive and struggling for a prolonged period. JA 54-56.

The Commonwealth wanted to prove facts beyond the four corners of Woodall's guilty plea. Woodall had not said how the crime was accomplished; he had not said how long Ms. Hansen was awake and struggling. As each lurid detail of the prosecutor's closing summation was put before the jury, they would have increasingly wanted to hear from Woodall. Jurors would have wanted to know the facts. They would have wanted an explanation. And they would have penalized Woodall for not answering their questions. *Lakeside*, 435 U.S. at 340; *Old* Chief, 519 U.S. at 189 n. 9.

Woodall is not arguing that a prosecutor should be prohibited from putting before the jury the facts of the crime. The circumstances of the crime are an important consideration in the determination of the proper punishment in a capital case. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). However, a death sentence should not rest on adverse inferences from constitutionally protected conduct. *Estelle* 451 U.S. at 463. *Cf. Zant*, 462 U.S. at 885 (citing *Jackson*, 390 U.S. 570). Here, Woodall's silence was constitutionally protected. The lack of the *Carter* instruction put an improper thumb on the Commonwealth's side of the scale. *Cf. Stringer*, 503 U.S. at 232.

5. The jury would have wanted to hear Woodall confirm the mitigation.

This Court has also made clear that mitigating evidence plays a vital role in the reliability of capital punishment decisions. Under *Lockett v. Ohio*, 438 U.S. 586 (1978) a jury is required to have a full opportunity to consider "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (plurality opinion). There is a "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Id.* at 605.

The Sixth Circuit properly recognized that a death verdict is not automatic. Pet. App. 10a-11a. The jury heard mitigating evidence that Woodall possessed limited intellectual functioning within the standard error of measurement for mental retardation; that he suffered from a personality disorder; that he was abandoned by his father; that he was neglected by his mentally ill mother; that he was sexually abused with soap suppositories; that he suffered extreme poverty; and that he exhibited good behavior while incarcerated. This Court has recognized the relevance of these types of mitigation. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) *overruled on other grounds by Atkins*, 536 U.S. 304; *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986); *Lockett*, 438 U.S. at 604.

The trial court's refusal to properly charge the jury allowed the jurors to consider why Woodall did not testify and gave evidentiary weight to Woodall's silence. One or more jurors may have been led to believe that Woodall remained silent because his borderline intellectual

functioning was insignificant or that his mental illness did not burden him. Or they may have believed that the dysfunctional upbringing, the poverty, and the sexual abuse they heard about did not really affect Woodall because he did not bother to explain it to them himself. Or they may have doubted Woodall's amenability to prison.

One juror even asked Woodall's father whether anyone had sexually abused Woodall. TE 1480. The juror likely believed that those who are sexually abused are more likely to commit sex acts. Later testimony confirmed sexual offenders are more likely to have themselves been victims. TE 1581.[13] The juror was likely looking for an explanation for the offense. This Court has found sexual abuse mitigation to be compelling. *See Wiggins*, 539 U.S. at 535. The jury, or even one juror, may have held it against Woodall that he did not confirm the abuse or explain how the abuse – soap slivers or something worse - shaped his psyche and compelled his criminal acts.

The Commonwealth contested all of the mitigation. The prosecution's closing argument took pains to meet each piece of the mitigation narrative. JA 60-64. The Commonwealth affirmatively undertook the task of trying to prove that the mitigation was slight and, consequently, that death was appropriate. The court's refusal to properly charge the jury allowed it to penalize Woodall for not providing the missing pieces from the narrative of his life, aiding the Commonwealth in its case for death. *Old Chief*, 519 U.S. at 189, fn. 9.

---

13. Petitioner states that Woodall in mitigation never tried to address why he committed the crime. Pet. Br. 37. However, Woodall clearly tied his sexual crimes to his own sexual abuse.

B. Alternatively, the Kentucky Supreme Court unreasonably applied *Chapman*.

Petitioner does not contest that *Brecht* and *O'Neal* are a proper framework for analyzing this case. *See* Pet. Br. 43-44. However, Texas, as Amicus for Petitioner, takes an inconsistent approach and believes that this Court's analysis should be whether under 28 U.S.C. § 2254(d) the Kentucky Supreme Court unreasonably applied the test of *Chapman v. California*, 386 U.S. 18 (1967). *Brief of Texas* 5-6. Texas' approach is flawed.

Texas' analysis is improper because this Court has already determined that § 2254(d) application is not necessary for errors of this category. *Fry v. Pliler*, 551 U.S. 112, 120 (2007). The "substantial and injurious" standard of *Brecht* subsumes the test of whether under § 2254(d) Kentucky unreasonably applied the *Chapman* "harmless beyond a reasonable doubt" standard. *Id.*

Texas' proposed approach is also flawed because Kentucky's prejudice analysis was unreasonable. The Kentucky Supreme Court decided prejudice as follows:

> The instruction contemplated by *Carter*[], could not have changed the outcome of a guilty determination that the defendant acknowledged by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.
>
> There is no error in this respect. Any possible error would be nonprejudicial because the defendant admitted the crimes and the evidence of guilt is overwhelming.

Pet. App. 261a-262a. The plain language illustrates that the Kentucky Supreme Court viewed the error as only implicating the guilt of the crime. However, *Chapman* analysis, like *Brecht* analysis, requires consideration of the "whole record." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The error's effect cannot be compartmentalized to exclude the sentencing phase of a capital case.

A state court decision constitutes an "unreasonable application" of federal law under § 2254(d)(1) when it correctly identifies the applicable rule but applies that rule to the facts in an objectively unreasonable manner. *Lockyer*, 538 U.S. at 75. The Kentucky Supreme Court's singular focus was on whether Woodall was contesting "any of the facts or aggravating circumstances surrounding the crimes." Pet. App. 263a. However, the prejudice lies in how the lack of the instruction altered the jury's calculus as to the appropriateness of the death penalty.

The plain language of the Kentucky Supreme Court's decision can only be read as evincing a narrow view of the impact of a no-adverse-inference instruction, related only to the statutory aggravators. There is no alternate reasonable explicated reason for the decision. *See Wetzel*, 132 S.Ct. at 1199; *Parker*, 132 S.Ct. 2151-2. Instruction #6 required the jury to find beyond a reasonable doubt that death was the proper punishment. Facts were at issue regarding this question. Therefore, even if post-*Fry*, a § 2254(d) analysis of Kentucky's *Chapman* application was proper, this Court is not constrained by AEDPA due to the infirmities of the state court decision.

CONCLUSION

For the above stated reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender
DAVID H. HARSHAW III
Assistant Federal Defender
OFFICE OF THE FEDERAL DEFENDER
EASTERN DISTRICT OF CALIFORNIA
801 I Street, 3rd Floor
Sacramento, CA 95616
(916) 498-6666
david_harshaw@fd.org

DENNIS J. BURKE
Assistant Public Advocate
DEPARTMENT OF PUBLIC ADVOCACY
207 Parker Drive, Suite 1
LaGrange, KY 40031
(502) 222-6682
dennis.burke@ky.gov

Counsel for Respondent Robert Keith Woodall

LAURENCE E. KOMP*
Attorney at Law
P.O. Box 1785
Manchester, MO 63011
(636) 207-7330
lekomp@swbell.net

**Counsel of Record*

REPLY BRIEF

RECORD
AND
BRIEFS

No. 12-794

In The
Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

JACK CONWAY
ATTORNEY GENERAL
OF KENTUCKY
SUSAN RONCARTI LENZ*
ASSISTANT ATTORNEY GENERAL
IAN G. SONEGO
SPECIAL ASSISTANT
ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342
susan.lenz@ag.ky.gov
Attorneys for Petitioner

**Counsel of Record*

December 3, 2013

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
ARGUMENT	4
I. The Kentucky Supreme Court did not unreasonably apply law clearly established by this Court	4
A. This Court's decisions did not clearly establish Woodall's right to the no-adverse-inference instruction he requested	4
B. AEDPA bars habeas relief in this case	13
II. Even if there were error, it was harmless under the *Brecht v. Abrahamson* standard	15
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....10, 12

Boyde v. California, 494 U.S. 370 (1990).....17, 18

Brecht v. Abrahamson, 507 U.S. 619 (1993).....*passim*

Burt v. Titlow, 571 U.S. ___, slip op. at 6 (Nov. 5, 2013).....15

Calderon v. Coleman, 525 U.S. 141 (1998).....17

California v. Ramos, 463 U.S. 992 (1983).....11

Carter v. Kentucky, 450 U.S. 288 (1981).....*passim*

Chaidez v. United States, 133 S.Ct. 1103 (2013).....14

Chapman v. California, 386 U.S. 18 (1967).....16, 17, 18, 20

Doan v. Carter, 548 F.3d 449 (6th Cir. 2008).....16

Estelle v. McGuire, 502 U.S. 62 (1991).....18

Estelle v. Smith, 451 U.S. 454 (1981).....*passim*

Gongora v. Thaler, 710 F.3d 267 (5th Cir. 2013).....21

Griffin v. California, 380 U.S. 609 (1965).....6, 10, 20

Harrington v. Richter, 131 S.Ct. 770 (2011).....3, 15

Hedgpeth v. Pulido, 555 U.S. 57 (2008).....16

Hodge v. Commonwealth, 17 S.W.3d 824 (Ky. 2000).....10

Hunt v. Commonwealth, 304 S.W.3d 15 (Ky. 2009).....10

Illinois v. Lidster, 540 U.S. 419 (2004).....5

TABLE OF AUTHORITIES – Continued

Page

Jensen v. Romanowski, 590 F.3d 373 (6th Cir. 2009) 16

Lambrix v. Singletary, 520 U.S. 518 (1997) 14

Mitchell v. United States, 526 U.S. 314 (1999) ..... *passim*

Ramdass v. Angelone, 530 U.S. 156 (2000) 14

Ring v. Arizona, 536 U.S. 584 (2002) 12

Rose v. Clark, 478 U.S. 570 (1986) 18, 20

Saffle v. Parks, 494 U.S. 484 (1990) 11

Sawyer v. Whitley, 505 U.S. 333 (1992) 12

Skaggs v. Commonwealth, 694 S.W.2d 672 (Ky. 1985) 10

St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004) 10

State v. Middleton, 368 S.E.2d 457 (S.C. 1988) 20

Sullivan v. Louisiana, 508 U.S. 275 (1993) 16

Teague v. Lane, 489 U.S. 288 (1989) 14

Thompson v. Commonwealth, 147 S.W.3d 22 (Ky. 2004) 10

Tuilaepa v. California, 512 U.S. 967 (1994) 11

Tyler v. Cain, 533 U.S. 656 (2001) 13

United States v. Hasting, 461 U.S. 499 (1983) 20, 21

Yarborough v. Alvarado, 541 U.S. 652 (2004) 14, 15

Yates v. Evatt, 500 U.S. 391 (1991) 18

Zant v. Stephens, 462 U.S. 862 (1993) 11

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V. 2, 4, 5, 7

FEDERAL STATUTES AND REGULATIONS

28 U.S.C. §2244(b)(2)(A) 14

28 U.S.C. §2254(d)(1) 2, 3, 7, 13, 14

§3E1.1 of the United States Sentencing Guidelines (1998) 6, 8

REPLY BRIEF FOR PETITIONER

This Court has held that a defendant who does not testify during the guilt-innocence phase of a trial is entitled to an instruction telling the jury that it should not draw any adverse inferences of guilt based on his silence. *Carter v. Kentucky*, 450 U.S. 288 (1981). And the Court has held that a sentencer may not draw an adverse inference, from a defendant's silence, with regard to a specific fact about the circumstances of the crime that would increase the sentencing range. *Mitchell v. United States*, 526 U.S. 314 (1999). This Court has never held, however, that a defendant is entitled to a no-adverse-inference instruction at a sentencing proceeding with respect to facts as to which the defendant bears the burden of proof. And it specifically left open whether a sentencer may draw an adverse inference of lack of remorse from a defendant's silence. *Id.* at 330.

The Kentucky Supreme Court therefore did not unreasonably apply clearly established law when it held that Robert Keith Woodall was not entitled to the broad no-adverse-inference instruction he requested at his capital sentencing proceeding. Woodall pleaded guilty to the crimes and aggravating circumstances that rendered him eligible for the death penalty. The no-adverse-inference instruction Woodall requested thus did not relate to his guilt or innocence or to the facts that rendered him eligible for the death sentence – the situations covered by this Court's precedents. Rather, his requested instruction encompassed terrain this Court has not yet reached and

would have barred the jury from inferring a lack of remorse based on his silence. This Court's precedents did not clearly establish Woodall's entitlement to such an instruction. In granting habeas relief to Woodall, the Sixth Circuit therefore disregarded the limits imposed by 28 U.S.C. §2254(d)(1), whose "unreasonable application" clause authorizes relief only when a state court ruling was "an unreasonable application of, clearly established Federal law, as determined by [this Court]."

Woodall defends the Sixth Circuit ruling by relying on the same faulty syllogism as the Sixth Circuit: (1) *Carter* held that the Fifth Amendment requires a no-adverse-inference instruction during the guilt-innocence phase of a trial; (2) *Estelle v. Smith*, 451 U.S. 454 (1981), held that the guilt and punishment phases of a trial should be treated the same for Fifth Amendment purposes; and therefore (3) as confirmed by *Mitchell*, a no-adverse-inference instruction is required during sentencing proceedings. BIO 3; Resp. Br. 16-19. That analysis reads *Estelle* for far more than it is worth, ignores express limits on *Mitchell*'s scope, and wrongly collapses the distinction between the *eligibility* phase and the *selection* phase of capital sentencing. Given the fundamentally different nature of those two phases, this Court has treated them differently in numerous contexts. Until the Court holds that they must be treated the same in this particular context, the law does not "clearly establish" the rule applied by the Sixth Circuit. Put another way, the Kentucky Supreme Court's

refusal to extend *Carter*, *Estelle*, and *Mitchell* to this case was not "an error . . . beyond any possibility for fairminded disagreement," as required for relief under the "unreasonable application" clause of §2254(d)(1). *Harrington v. Richter*, 131 S.Ct. 770, 786-787 (2011).

Alternatively, even if the trial court erred in not giving the requested no-adverse-inference instruction, that error did not have "substantial and injurious effect on the jury's verdict," as required by *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In concluding otherwise, the Sixth Circuit made two fundamental errors, repeated by Woodall. It converted the *Brecht* standard to a possible-harm standard and it failed to take into account all the evidence the jury considered when deciding upon the punishment. Given Woodall's admission of guilt of the brutal and senseless crimes, his prior sexual abuse convictions, and his conduct after he raped the young victim and threw her in the lake to drown, any inferences the jury may have drawn from Woodall's silence did not have a "substantial and injurious effect." The Sixth Circuit's judgment should be reversed.

ARGUMENT

I. The Kentucky Supreme Court did not unreasonably apply law clearly established by this Court.

A. This Court's decisions did not clearly establish Woodall's right to the no-adverse-inference instruction he requested.

Carter, *Estelle*, and *Mitchell* do not, individually or collectively, establish a right to a no-adverse-inference instruction during the selection phase of a capital sentencing proceeding where the defendant pleaded guilty to the capital offense and aggravating circumstances that made him eligible for the death penalty. Woodall's arguments to the contrary lack merit.

1. At times Woodall appears to suggest that *Estelle*, standing alone, established his right to the instruction. *See* Resp. Br. 32-34. That contention reflects a fundamental misapprehension of the sweep of this Court's decisions. To be sure, *Estelle* stated that "[w]e can discern no basis to distinguish between the guilt and penalty phases of [a defendant's] capital murder trial so far as the protection of the Fifth Amendment is concerned." 451 U.S. at 462-463. But the Court made that statement in addressing a Fifth Amendment claim made by a defendant whose un-Mirandized statement to a psychiatrist was being used against him to prove a fact necessary, under Texas law, to impose a death sentence. The Court

rejected Texas's contention that the Fifth Amendment does not apply at all "to the penalty phase of a capital murder trial," which would have meant the state could introduce statements a defendant was compelled to make. *Ibid.*

Statements in this Court's decisions are not properly read as definitively resolving "quite different circumstances that the Court was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). The Court in *Estelle* was not considering a defendant's silence, adverse inferences, and jury instructions. *Estelle* therefore did not clearly establish any law regarding jury instructions intended to forestall adverse inferences from a defendant's silence. The *Mitchell* Court certainly took into account *Estelle*'s statement that it discerned no basis to distinguish between the guilt and penalty phases when it considered the use of adverse inferences to find a fact that increased the sentencing range. 526 U.S. at 329. But *Estelle* did not clearly establish the legal rule the Court ultimately adopted in *Mitchell* – much less the question the Kentucky Supreme Court faced here.

2. Woodall places the rest of his eggs in the *Mitchell* basket, contending that *Mitchell* established that "[a] sentencing fact-finder is not permitted to draw adverse inferences from a defendant's silence," Resp. Br. 30, and that various facts were in dispute during his sentencing proceeding. *Id.* at 35-36. As an initial matter, *Mitchell* did not involve a no-adverse-inference instruction; the trial court itself drew adverse inferences. Beyond that, Woodall ignores

important limitations expressly set out in *Mitchell* and ignores fundamental differences between the eligibility and sentencing phases of capital proceedings.

Mitchell did not hold that a defendant is entitled to a no-adverse-inference instruction any time a fact is disputed in a sentencing proceeding. Rather, it contains four express limitations. ***First***, *Mitchell* dealt only with facts as to which the government bore the burden of proof (whether Mitchell distributed more than five kilograms of cocaine). 526 U.S. at 330. ***Second***, *Mitchell* dealt only with facts that, if found, would increase the sentencing range – akin to aggravating facts that would make a defendant death-eligible. *Id.* 317-319. ***Third***, *Mitchell* specifically stated that it was addressing "factual determinations respecting the circumstances and details of the crime." *Id.* at 328; *see also id.* at 329 (respecting "the commission of disputed acts"); *id.* at 330 ("relevant to the crime"). And ***fourth***, *Mitchell* expressly stated that "[w]hether silence bears upon the determination of lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 of the United States Sentencing Guidelines (1998), is a separate question" upon which "we express no view." *Ibid.*

a. Starting with the last limitation on *Mitchell*'s reach, Woodall cannot overcome the import of *Mitchell*'s expressly leaving open how *Griffin v. California*, 380 U.S. 609 (1965) applies to "the determination of lack of remorse." It should go without saying that an issue expressly left open in one of this Court's decisions is

not "clearly established" law. This Court has therefore *not* "clearly established" that a defendant is entitled to an instruction barring the jury from inferring lack of remorse from his silence. And that means §2254(d)(1) bars a grant of habeas relief based on a state court's refusal to issue such an instruction. Yet the Sixth Circuit granted habeas relief based on precisely that. *See* Opening Br. 40-42.

Woodall asked for a broad no-adverse-inference instruction that would have told the jury that "the fact that the defendant did not testify should not prejudice him in any way." J.A. 31. This instruction would have barred the jury from inferring lack of remorse from Woodall's silence, as he acknowledges. Resp. Br. 36-38, 51-53. And that is precisely why the trial court rejected it. J.A. 36-39. In short, the trial court answered an open question adversely to the defendant. Such a holding may not form the basis for habeas relief under §2254(d)(1).

Woodall attempts to deal with this by re-writing *Mitchell*. According to Woodall (Br. 37), "*Mitchell* did not leave open . . . the question of whether silence bears upon lack of remorse as it pertains to a capital sentencing proceeding." Rather, he contends, *Mitchell* "left open the question of whether a convicted defendant has Fifth Amendment protections with respect to the federal sentencing guidelines remorse/acceptance of responsibility downward departure." Resp. Br. 37-38. That is flatly incorrect.

To quote *Mitchell* again: "Whether silence bears upon the determination of lack of remorse, or upon

acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 of the United States Sentencing Guidelines (1998), is a separate question" upon which "we express no view." 526 U.S. at 330. The phrase "lack of remorse" stands alone and is not connected to the reference to the Guidelines, which is set off by commas. Indeed, a "lack of remorse" can never lead to a downward adjustment. The Court's reference to "the determination of a lack of remorse" can refer only to a finding that would lead a fact-finder to impose a higher penalty than it otherwise might. In short, then, the law did not clearly establish Woodall's right to an instruction – such as the one he requested – that would have told the jury not to infer lack of remorse from his silence.[1]

b. Woodall is no more successful in overcoming the import of the first three limitations in *Mitchell*. Woodall does not deny that he bore the burden of proving mitigating factors, that his proposed instruction encompassed those facts, yet that *Mitchell* addressed only facts as to which the *government* bore the burden of proof. And he has no response to

---

[1] Woodall insists (Br. 38) that "*Mitchell* would have played out in an identical fashion if the sentencing range increase had been for lack of remorse rather than a quantity of cocaine." Of course, if that were so, the Court would not have expressly left open "[w]hether silence bears upon the determination of lack of remorse. . . ." The Court plainly believed that adverse inferences with respect to lack of remorse might be appropriate even though adverse inferences with respect to the quantity of drugs sold were not.

Mitchell's statement that "[t]he question is whether the Government *has carried its burden of proving its allegations* while respecting the defendant's individual rights." 526 U.S. at 330 (emphasis added). The rule *Mitchell* established is that "[t]he Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Ibid.* The Sixth Circuit adopted a far broader rule when it held that Woodall was entitled to his proposed instruction.

Another way of putting it is that *Mitchell* dealt only with facts that would increase the sentencing range, which are akin to aggravating facts that would make a defendant death-eligible. The government, of course, has the burden of proving such facts and they typically involve "the circumstances and details of the crime." *Mitchell*, 526 U.S. at 328. By contrast, the selection phase of sentencing – be it a judge imposing a discretionary sentence in a non-capital case or a jury in a capital sentencing proceeding – involves far different considerations. The government does not have the burden of proving most of the factors considered during the selection phase and many of them do not involve "the circumstances and details of the crime."[2]

---

[2] Kentucky allows the jury to consider evidence regarding non-statutory aggravating circumstances but does not impose any burden of proof on the prosecution regarding non-statutory aggravating circumstances because Kentucky is a non-weighing

(Continued on following page)

The Sixth Circuit's rule extended *Mitchell* to a vast new terrain.[3]

Woodall's principal response is "that the Commonwealth bore the burden to prove the death penalty," as shown (he contends) by Instruction No. 6. Resp. Br. 34-35. As an initial matter, the Kentucky Supreme Court directly stated – well before the trial in this case – that "[t]here is no requirement that the jury be instructed to find that death is the appropriate punishment beyond a reasonable doubt." *Skaggs v. Commonwealth*, 694 S.W.2d 672, 680 (Ky. 1985). Even putting to the side Woodall's effort to obtain habeas relief based on a jury instruction to which

---

State. *Hunt v. Commonwealth*, 304 S.W.3d 15, 50-51 (Ky. 2009). *Also see, Hodge v. Commonwealth*, 17 S.W.3d 824, 853-854 (Ky. 2000); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 571 (Ky. 2004); *Thompson v. Commonwealth*, 147 S.W.3d 22, 49-50 (Ky. 2004).

[3] Indeed, as noted in our opening brief at 32, this Court has never held that *Griffin* or *Carter* applies to a genuine sentencing proceeding. *Mitchell* dealt only with facts that, if found, required imposition of an increased penalty range; and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), held that such facts are elements of the offense, not mere sentencing factors. Woodall's only response (Br. 41-42) is that *Estelle* addressed a fact – future dangerousness – that was a selection factor under Texas law. Once again, though, Woodall wrongly reads *Estelle* – a case involving a compelled statement – as clearly establishing the law with respect to adverse inferences to be drawn from a defendant's silence. Further, because a Texas jury could not impose a death sentence without finding future dangerousness, *Estelle*, 451 U.S. at 457-458, that fact might properly be considered an element of the offense and not a mere sentencing factor.

he was not entitled, his argument lacks merit. This Court has long recognized that determining whether the death penalty should be imposed on a capital defendant is a fundamentally different inquiry than finding specific facts that determine whether a defendant is guilty or is eligible for the death penalty.

As Justice Brennan stated, "[t]he decision whether to impose the death penalty represents a moral judgment about the defendant's culpability, not a factual finding." *Saffle v. Parks*, 494 U.S. 484, 506 (1990) (Brennan, J., dissenting). "[S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does." *California v. Ramos*, 463 U.S. 992, 1008, fn. 21 (1983) (quoting *Zant v. Stephens*, 462 U.S. 862, 902 (1993) (Rehnquist, J., concurring in the judgment)). There is therefore a "fundamental difference between the nature of the guilt/innocence determination . . . and the nature of the life/death choice at the penalty phase." *Id.* at 1007. Whereas to find guilt "the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt," a jury deciding whether to select death does not address a "similar 'central issue.'" *Id.* at 1008. That is why states do not have to instruct juries on "how to weigh any particular fact in the capital sentencing decision" and why juries may be given wide "discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) (internal quotation marks omitted).

The difference between the eligibility phase and the selection phase of a capital proceeding is reflected in the different way criminal procedure rules apply to them. A defendant can excuse a procedural default by proving he is "innocent" of the statutory aggravating factor that made him eligible for the death sentence. *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992). But a defendant may not prove "innocence" of the death penalty by proving "the existence of additional mitigating evidence" that bears "on the ultimate discretionary decision between the death penalty and life imprisonment." *Id.* at 343, 345. Similarly, the Court held in *Ring v. Arizona*, 536 U.S. 584, 589 (2002), that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment," but has not extended *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to the penalty selection phase of a capital sentencing proceeding. As Justice Scalia explained in his concurring opinion in *Ring*, "What today's decision says is that the jury must find the existence of a *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so . . . ." 536 U.S. at 612-613.

In short, when this Court establishes a clear rule with respect to the eligibility phase of capital sentencing, it does not also clearly establish that rule with respect to the selection phase. *Mitchell*'s holding and reasoning pertain only to the former and, particularly in leaving open how lack of remorse should be treated, strongly suggest that a different rule may apply to

the latter. The Kentucky Supreme Court therefore did not fail to abide by "clearly established" law when it upheld the trial court's refusal to issue Woodall's proposed instruction.[4]

B. AEDPA bars habeas relief in this case.

For the reasons discussed above, this Court has not clearly established a rule that would entitle Woodall to his proposed instruction. That constitutes an absolute barrier to habeas relief under 28 U.S.C. §2254(d)(1), which authorizes relief only when a state court merits decision "was contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by [this Court]" (emphasis added).

Woodall attempts to overcome that barrier by watering down §2254(d)(1). First, he maintains (Br. 21) that the Court can clearly establish a principle through "a matrix of cases." Even if that were the case, *but see* Criminal Justice Legal Foundation amicus brief 10-16, the rule produced by a "matrix of cases" would have to be "dictated" by pre-existing rulings of the Court. *Cf. Tyler v. Cain*, 533 U.S. 656,

---

[4] Woodall contends that multiple state and federal courts have applied *Carter* to capital sentencing proceedings. Resp. Br. 30-31 & fns. 5 & 6. First off, lower court decisions cannot clearly establish the law for AEDPA purposes. Second, his contention fails on its own terms because none of these cases involved guilty pleas by the defendants.

666-667 & fn. 7 (2001) (finding that this Court did not, through two separate opinions, make a rule retroactive for purposes of 28 U.S.C. §2244(b)(2)(A) because the habeas petitioner's proposed syllogism did not "necessarily dictate" that the Court had made the rule in question retroactive).[5] As discussed in Section I(A) above, *Carter*, *Estelle*, and *Mitchell* do not produce clearly established pre-existing rulings that "necessarily dictate" the rule adopted by the Sixth Circuit.

Second, Woodall argues that habeas relief may be granted if a state court unreasonably declines "'to extend the governing legal principle to a context in which the principle should have controlled.'" Resp. Br. 21 (quoting *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) (plurality opinion)). But he has no response to the concern expressed by this Court four years later that "[t]here is force to th[e] argument" made by the state that "if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004). "Section 2254(d)(1)

---

[5] In applying the *Teague v. Lane*, 489 U.S. 288 (1989), non-retroactivity doctrine the Court has required that the application of a new rule must be "dictated" by precedent existing at the time that the prisoner's direct appeal concluded. *Chaidez v. United States*, 133 S.Ct. 1103, 1107 (2013). "And a holding is not so dictated, we later stated, unless it would have been 'apparent to all reasonable jurists.'" *Id.*, quoting, *Lambrix v. Singletary*, 520 U.S. 518, 527-528 (1997).

would be undermined if habeas courts introduced rules not clearly established under the guise of extensions of law." *Ibid.*

Nor was the Kentucky Supreme Court in any way "unreasonable" in declining to extend *Carter*, *Estelle*, and *Mitchell* to this case. A state court "unreasonably" applies this Court's clearly established law when it makes "an error . . . beyond any possibility for fairminded disagreement." *Burt v. Titlow*, 571 U.S. ___, slip op. at 6 (Nov. 5, 2013) (quoting *Harrington v. Richter*, 131 S.Ct. 770, 786-787 (2011)). Given the various other contexts in which this Court has not applied the same rules to the eligibility and selection phases of capital sentencing, and the limits expressly set out in *Mitchell*, fairminded jurists could readily disagree whether to extend *Carter*, *Estelle*, and *Mitchell* to this case.

II. Even if there were error, it was harmless under the *Brecht v. Abrahamson* standard.

As explained in our opening brief (at 43-48), the Sixth Circuit applied an improper harmless-error standard and, as a consequence, reached the wrong result. In defending the Sixth Circuit, Woodall repeats many of its errors and adds several of his own.

1. Woodall insists (Br. 43-44) that the Sixth Circuit "applied the harmless error test of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)." And there is no denying that the court began its harmless-error discussion by citing *Brecht* and reciting its

"substantial and injurious effect" standard. But as the court elaborated on its understanding of the *Brecht* standard, things quickly went awry. The court cited two of its own precedents as establishing that "[t]o determine the effect of an error, the court must determine 'whether the [outcome that was] actually rendered in this trial was *surely unattributable* to that error.'" Pet. App. 9a (emphasis added) (quoting *Doan v. Carter*, 548 F.3d 449, 459 (6th Cir. 2008)). But *Doan* – which also was purporting to apply *Brecht* – borrowed that "surely unattributable" language from *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), which was describing the more defendant-friendly standard of *Chapman v. California*, 386 U.S. 18 (1967).

The court also relied on a prior Sixth Circuit decision which held that an error in a habeas case is harmful unless the court can "*be certain* that the error had 'no small effect' on the jury's verdict." Pet. App. 12a (emphasis added) (quoting *Jensen v. Romanowski*, 590 F.3d 373, 381 (6th Cir. 2009). This Court has stated emphatically, however, that "an 'absolute certainty' standard is plainly inconsistent with *Brecht*." *Hedgpeth v. Pulido*, 555 U.S. 57, 62 (2008) (*per curiam*). Finally, the Sixth Circuit here added still another incorrect gloss on the standard by stating: "Because we cannot know what led the jury to make the decision that it did, and because the jury may well have based its decision on Woodall's failure to testify, we cannot conclude that this is a case of 'harmless error.'" Pet. App. 11a. As Judge Cook

explained in her dissent, that is "a form of *possible*-harm review that verges on a presumption of prejudice." Pet. App. 24a. But mere speculation that the jury was improperly influenced by a constitutional error is not sufficient. *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (*per curiam*).[6]

2. The Sixth Circuit took another wrong turn when it failed to assess the importance of the error in relation to other evidence presented during Woodall's sentencing proceeding. The court stated that "the overwhelming evidence of Woodall's guilt presented during the penalty phase and the overwhelming evidence of the heinousness of the crimes" were irrelevant because "the finding of the aggravating circumstances did not compel the jury to recommend a death sentence." Pet. App. 10a. That misses the point. Even if the overwhelming evidence of Woodall's guilt of a brutal murder, kidnapping, and rape did not "*compel* the jury to recommend a death sentence," it certainly was the key factor that *convinced* the jury to recommend a death sentence. The Sixth Circuit's failure to take that evidence into account misperceives the nature of the harmless-error inquiry. Woodall repeats that mistake by barely giving a nod to the brutal nature of the crime and the other factors that led the jury to impose a death sentence.

---

[6] *Boyde v. California*, 494 U.S. 370, 380, fn. 4 (1990), explained, "[W]e have held that a defendant cannot establish a constitutional violation simply by demonstrating that an alleged trial-related error could or might have affected the jury."

An error is not harmful (whether under *Brecht* or *Chapman*) merely because the jury was aware of the improper evidence or consideration. Virtually all errors subject to harmless-error review – including "unconstitutional comment on a defendant's silence" – "alter the terms under which the jury considered the defendant's guilt or innocence, and therefore all theoretically impair the defendant's interest in having the jury decide his case." *Rose v. Clark*, 478 U.S. 570, 582, fn. 11 (1986). The question is whether the "error" is "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991) (applying the *Chapman* harmless-error standard).[7] And to answer that question, a court "must ask what evidence the jury actually considered in reaching its verdict" and then "weigh the probative force of that evidence as against the probative force of the error standing alone." *Id.* at 404.

Applied here, the outcome of that weighing is unmistakable: Any error was harmless. As summarized in our opening brief (at 4-9, 44-45), the prosecution presented overwhelming evidence of Woodall's guilt, the brutality of the crimes and aggravating circumstances, Woodall's prior sex crimes, and Woodall's failure to complete a sex offender treatment program. He kidnapped, raped, and intentionally murdered the

---

[7] *Yates* was disapproved in part on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 72, fn. 4 (1991), citing *Boyde v. California*, *supra*.

victim, including throwing her into a lake to drown. Woodall has nothing to say about this side of the equation, treating it – like the Sixth Circuit – as if it were irrelevant to the harmless-error analysis.

On the other side of the ledger, Woodall cannot deny that the jury heard his mitigation evidence and considered it when deciding upon the appropriate punishment. He instead relies on the improbable chance that the jury might have inferred from his silence that he did not really experience poverty or have low intellectual functioning, a personality disorder, or a "dysfunctional upbringing." Resp. Br. 55-56. But apart from his blunderbuss assertion that a jury will simply "penalize[ ]" a defendant for not testifying (Br. 54), Woodall does not explain why a jury would ignore that mitigating evidence simply because he did not testify.

Similarly, there is no reason to believe the outcome of this case at all turned on whether the jury believed that Woodall's grandmother's administration of soap suppositories to deal with a bowel condition technically constituted sexual abuse. *But see* Resp. Br. 56. The fact of what the grandmother did, as opposed to its characterization, was not disputed. 10 T.E. 1446; J.A. 64.

Finally, Woodall contends (Br. 51) that "the prosecution used Woodall's silence as evidence of lack of remorse." Not so. Contrary to Woodall's argument, the prosecutor's reference to Woodall's hanging his head down during the trial was not a comment upon

Woodall's lack of remorse or his failure to testify, but instead was a comment upon how Woodall's behavior was different than the night he committed the crimes. J.A. 58; Pet. App. 285a-286a. If the jury concluded that Woodall lacked remorse, it was no doubt because the undisputed evidence showed that after he committed the crimes he returned to his mother's house and fell asleep watching television as if nothing had happened. 10 T.E. 1464-1466.

3. At bottom, Woodall effectively asks this Court to adopt a presumption that the failure to give the jury a no-adverse-inference instruction during a sentencing proceeding is never harmless. This Court's precedents foreclose that approach, and properly so. In *United States v. Hasting*, 461 U.S. 499, 509-512 (1983), the Court found a *Griffin* error to be harmless under the *Chapman* standard. And the Court approvingly cited *Hasting* in *Rose v. Clark*, where it stated that "unconstitutional comment on a defendant's silence" is not "immune from harmless-error analysis." 478 U.S. at 582, fn. 11. If *Griffin* error – which does not even require a court to speculate that the sentencer took the defendant's silence into account – can be harmless under the *Chapman* standard, it surely follows that *Carter* error can be harmless under *Brecht*.

Had the trial court or the prosecutor told the jury that Woodall's silence made him more deserving of death, this would be a closer case. *Compare State v. Middleton*, 368 S.E.2d 457, 461 (S.C. 1988) (finding *Carter* error harmless where "the solicitor made no

reference to the appellant's failure to testify"), *with Gongora v. Thaler*, 710 F.3d 267, 278-280 (5th Cir. 2013) (finding *Carter* error harmful where "the prosecutor's remarks on [the defendant's] failure to testify were numerous and blatant") (internal quotation marks omitted). But the trial court did not tell the jury to infer anything from Woodall's silence, and the prosecutor's closing argument did not mention Woodall's failure to testify or failure to express remorse. J.A. 50-66. There is therefore no reason to believe the court's failure to issue a no-adverse-inference instruction had a "substantial and injurious effect or influence in determining the jury's verdict."

Under the *Brecht* standard, taking into account the entire record, Woodall's guilty plea admissions, the overwhelming evidence of guilt, the facts and circumstances of the crimes and aggravating circumstances, Woodall's prior crimes, Woodall's mitigating evidence, and the closing arguments by counsel, the denial of Woodall's tendered modified *Carter* instruction did not have a substantial and injurious effect or influence in determining the jury's verdict. The Sixth Circuit majority failed in its duty to undertake any detailed review of the record as required by the Court's rulings. In the end, the Sixth Circuit failed to heed this Court's admonition: "[I]t is the duty of the reviewing court to consider the trial record as whole and to ignore errors that are harmless, including most constitutional violations." *Hasting*, 461 U.S. at 509.

CONCLUSION

For the foregoing reason, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL
OF KENTUCKY
SUSAN RONCARTI LENZ*
ASSISTANT ATTORNEY GENERAL
IAN G. SONEGO
SPECIAL ASSISTANT
ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342
susan.lenz@ag.ky.gov
Attorneys for Petitioner

**Counsel of Record*

December 3, 2013

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 17 2013
OFFICE OF THE CLERK

RECORD
AND
BRIEFS

No. 12-794

In the Supreme Court of the United States

RANDY WHITE, WARDEN,
Petitioner,

v.

ROBERT KEITH WOODALL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF ARIZONA AND THIRTEEN OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONER

THOMAS C. HORNE
ATTORNEY GENERAL OF ARIZONA
ROBERT L. ELLMAN
Counsel of Record
SOLICITOR GENERAL
1275 West Washington Street
Phoenix, AZ 85007
Phone (602) 542-3333
Fax (602) 542-8308
robert.ellman@azag.gov

Counsel for Amici Curiae

Counsel continued on inside cover

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress
Law Library

LUTHER STRANGE
ATTORNEY GENERAL OF ALABAMA
501 Washington Avenue
Montgomery, AL 36130

JOHN W. SUTHERS
COLORADO ATTORNEY GENERAL
RALPH L. CARR COLORADO
JUDICIAL CENTER
1300 Broadway, Tenth Floor
Denver, CO 80203

SAMUEL S. OLENS
GEORGIA ATTORNEY GENERAL
40 Capitol Square
Atlanta, GA 30334

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL
P.O. Box 83720
Boise, ID 83720-0010

DEREK SCHMIDT
KANSAS ATTORNEY GENERAL
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612-1597

TIMOTHY C. FOX
MONTANA ATTORNEY GENERAL
P.O. Box 201401
Helena, MT 59620-1401

CATHERINE CORTEZ MASTO
ATTORNEY GENERAL FOR THE
STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

GARY K. KING
NEW MEXICO ATTORNEY GENERAL
P. O. Drawer 1508
Santa Fe, NM 87504-1508

ROBERT W. FERGUSON
WASHINGTON ATTORNEY GENERAL
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

ALAN WILSON
ATTORNEY GENERAL OF
SOUTH CAROLINA
P. O. Box 11549
Columbia, SC 29211

MARTY J. JACKLEY
ATTORNEY GENERAL OF
SOUTH DAKOTA
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

ROBERT E. COOPER, JR.
ATTORNEY GENERAL OF TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207

PETER K. MICHAEL
ATTORNEY GENERAL OF WYOMING
123 Capitol Building
200 W. 24th Street
Cheyenne, WY 82002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. The No-Adverse-Inference Instruction Serves No Purpose Where the Defendant's Admissions and Concessions Establish the Same Adverse Facts that the Jury Might Otherwise Impermissibly Infer from His Silence 5

A. This Court's Precedent Requires the No-Adverse-Inference Instruction When the Defendant Chooses Not to Testify Concerning Contested Adverse Facts 7

B. Upholding the Sixth Circuit Decision Will Undermine the Fairness and Accuracy of Sentencing Proceedings Without Furthering Any Fifth Amendment Principle 11

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Bell v. Thompson,
545 U.S. 794 (2005) 16

Bonin v. Calderon,
59 F.3d 815 (9th Cir. 1995) 15

Carter v. Kentucky,
450 U.S. 288 (1981) ..... *passim*

Delo v. Lashley,
507 U.S. 272 (1993) 15

Estelle v. Smith,
451 U.S. 454 (1981) 3, 10, 11, 12, 13

Furman v. Georgia,
408 U.S. 238 (1972) 15

Griffin v. California,
380 U.S. 609 (1965) ..... *passim*

Kansas v. Marsh,
548 U.S. 163 (2006) 15

Malloy v. Hogan,
378 U.S. 1 (1964) 7

McGautha v. California,
402 U.S. 183 (1971) 15

Minnesota v. Murphy,
465 U.S. 420 (1984) 7

Mitchell v. United States,
526 U.S. 314 (1999) ..... *passim*

Murphy v. Waterfront Comm.,
378 U.S. 52 (1964) 2

Penry v. Johnson,
532 U.S. 782 (2001) 14

Ring v. Arizona,
536 U.S. 584 (2002) 15, 16

Sawyer v. Whitley,
505 U.S. 333 (1992) 16

United States v. Constantine,
263 F.3d 1122 (10th Cir. 2001) 15

Walton v. Arizona,
497 U.S. 639 (1990) 15

CONSTITUTION

U.S. Const. amend. V ..... *passim*

INTEREST OF *AMICI CURIAE*

Amici curiae, as the chief law enforcement officers of their respective states, have a strong interest in protecting the fairness and accuracy of criminal sentencing proceedings. The Sixth Circuit decision degrades fairness and accuracy in sentencing by misapplying the prophylactic Fifth Amendment rule formulated in *Carter v. Kentucky*, 450 U.S. 288 (1981). That rule requires courts to instruct juries not to draw an adverse inference from a defendant's silence regarding disputed elements of the state's case. Here, the defendant's admissions and concessions have established all of the adverse facts that render him eligible for the maximum allowable punishment. Therefore, the no-adverse-inference instruction neither shields the defendant's invocation of his Fifth Amendment right to remain silent from impermissible inferences nor preserves the state's burden of proof. Instead, giving the no-adverse-inference invites confusion and threatens to corrupt the deliberations. The *amici* urge this Court to find the instruction impermissible in these circumstances.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief addresses the unsoundness of using the prophylactic "no-adverse-inference" instruction in a case where the defendant has either admitted or conceded the facts a jury might otherwise improperly infer from his silence. The concerns behind the *Carter* rule – fear that the jury will speculate about the existence of adverse facts and that its improper

inferences may effectively shift the burden of proof – do not present themselves in such circumstances.

The Sixth Circuit's decision disregards those circumstances. Rather than grounding its decision in a functional analysis of this Court's case law, the Sixth Circuit erroneously concludes that trial courts must give the no-adverse-inference instruction in every case where the defendant chooses not to testify, including cases such as Woodall's where the instruction serves no purpose.

The no-adverse-inference rule has its modern origins in *Griffin v. California*, 380 U.S. 609, 614-15 (1965). In *Griffin*, this Court prohibited state courts and prosecutors from "solemniz[ing] the silence of the accused into evidence against him" through judicial instruction or prosecutorial commentary that invited jurors to draw inculpatory inferences from the defendant's decision not to testify regarding facts within his knowledge that they would expect him to deny or explain. The rule rests on the principle that adverse inferences based on the refusal to testify are "a remnant of the inquisitorial system of criminal justice" that impermissibly penalize a defendant for exercising the constitutional privilege to decline testifying. *Id.* at 614 (quoting *Murphy v. Waterfront Comm.*, 378 U.S. 52, 55 (1964)).

This Court broadened the rule in *Carter v. Kentucky*, 450 U.S. 288, 300 (1981), finding constitutional error where the trial court denied the defendant's request for a no-adverse-inference instruction. The opinion found that the penalty exacted in *Griffin* by adverse comment on the

defendant's silence "may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt." *Id.* at 301. The feared speculation in *Carter*, as in *Griffin*, attached to every element of proof, as the defendant stood on the presumption of innocence and required the state to prove every element of the crime.

This Court extended the privilege against self-incrimination to capital sentencing proceedings in *Estelle v. Smith*, 451 U.S. 454, 462 (1981). *Estelle v. Smith* held that the state violated the privilege by introducing Smith's pretrial statements, which he made during a court-ordered psychiatric examination, to prove his future dangerousness, a contested fact that rendered the defendant eligible for a death sentence. 451 U.S. at 469. Accordingly, the Fifth Amendment now bars the use of a defendant's court-ordered pretrial disclosures at sentencing absent warnings or admonitions demonstrating an awareness of the privilege and the sentencing consequences of forgoing it. *Id.* at 467, 469.

Finally, in *Mitchell v. United States*, 526 U.S. 314, 318 (1999), this Court applied the no-adverse-inference principle to contested facts at sentencing in a case where the defendant had entered a guilty plea. This Court held that the defendant's waiver of the Fifth Amendment privilege for purposes of establishing the factual basis of her guilty plea did not extend to contested facts relevant only to punishment. *Id.* at 325. Consequently, the trial court erred in drawing

adverse inferences as to those contested facts based on her guilty plea waiver. *Id.* at 330.

These cases, unlike Woodall's case, involved a contested issue of at least one fact necessary to prove guilt or impose a greater punishment. In contrast, Woodall's guilty plea to the kidnapping and rape charges established the two statutory aggravating factors that subjected him to a capital sentence on the murder charge; Woodall expressly conceded the existence of the other adverse facts introduced by the Commonwealth during the penalty phase trial; and the only contested matters were based on evidence Woodall introduced in mitigation.

Absent contested adverse facts, there is no danger of speculation based on adverse inferences, and no possibility that a jury will presume the existence of an adverse fact based on the defendant's silence. This Court's cases cannot be read, together or individually, to require a no-adverse-inference instruction when the defendant's admissions and concessions leave no adverse inference to draw. The no-adverse-inference instruction in such cases invites ridicule, as it informs the jury not to *infer* a fact that the defendant already *established* through his prior admissible statements or has already conceded. The testimonial privilege needs no protection from speculation because the defendant's prior statements and concessions leave nothing to speculate about.

The jury, on the other hand, needs protection from inapplicable instructions that threaten to corrupt the verdict. When the trial court gives a no-adverse-inference instruction in a case where the defendant's

admissions and concessions establish the very same adverse facts that his testimony would otherwise deny or explain, the instruction can only confound a juror. The instruction assumes that facts within the defendant's knowledge are at issue. Consequently, it implies that the prosecution must prove something more – some other fact within the defendant's knowledge – in order to carry its burden of proof. The instruction causes rather than prevents speculation in these circumstances.

A jury that follows the instruction in such circumstances will falter. A jury cannot both consider the defendant's actual statements in his guilty pleas *and* speculate what the defendant's statements might be or why the defendant chose not to speak. The instruction in these circumstances is contradictory. As such, it threatens the accuracy of the jury's deliberations and, therefore, the fairness of its verdicts.

ARGUMENT

I. The No-Adverse-Inference Instruction Serves No Purpose Where the Defendant's Admissions and Concessions Establish the Same Adverse Facts that the Jury Might Otherwise Impermissibly Infer from His Silence.

The issues presented arise in the context of Woodall's penalty phase trial after he pled guilty to an especially brutal and depraved murder. In 1997, Woodall kidnapped, raped, slashed and drowned his teenaged victim – a stranger he happened upon in a convenience store. Pet. App. 32a. After initially

denying his involvement, Woodall pled guilty to kidnapping, rape and murder "after he realized the amount of evidence the state had against him." *Id.* at 285a-286a.

At the penalty trial, Woodall declined to testify. Pet. App. 3a, 33a, 44a. The Commonwealth relied on Woodall's guilty plea to kidnapping and rape to establish his eligibility for a death sentence. Pet. App. 14a, 22a, 27a. Woodall conceded the existence of the additional adverse facts that the Commonwealth introduced at sentencing, including his prior convictions for two counts of first-degree sexual abuse involving one victim.[1] Pet. App. 262a; transcript of evidence vol. 10 pp. 1330, 1422-23.

Notwithstanding his guilty plea to "all of the charged crimes as well as the aggravating circumstances," Pet. App. 263a, and his express admission as to *all* adverse facts introduced by the Commonwealth that "he did those things," Joint App. 69, Woodall requested a *Carter* instruction advising the jurors "to draw no adverse inference from the decision of Woodall not to testify during the penalty trial." Pet. App. 261a. The trial court declined the request, finding it would not be "intellectually honest" and citing the court's "responsibility of not just giving instructions to juries just for the sake of protecting the record and

---

[1] The prosecutor introduced evidence of Woodall's prior convictions. Transcript of evidence vol. 10, p. 1330. In cross-examining Woodall's grandmother, the prosecutor elicited testimony that Woodall had sexually abused three of her grandchildren. *Id.* at 1445.

being beyond an abundance of caution." *Id.* Pet. App. 45a.

Woodall assigned error to the trial court's decision not to give the instruction, citing *Mitchell*. Pet. App. 262a. The Kentucky Supreme Court found no error, distinguishing *Mitchell* on the ground that "Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes." *Id.* at 263a.

The Kentucky courts committed no error. The *amici* urge this Court to find that the trial court correctly declined the *Carter* instruction on the ground that the instruction is illogical and invites confusion where the defendant has admitted or conceded all of the adverse facts a jury might otherwise improperly infer.

A. This Court's Precedent Requires the No-Adverse-Inference Instruction When the Defendant Chooses Not to Testify Concerning Contested Adverse Facts.

The Fifth Amendment Self-incrimination Clause, applicable to the states through the Fourteenth Amendment,[2] provides that "[n]o person shall be compelled in any criminal case to be a witness against himself." The derivative privilege against compelled self-incrimination is the constitutional right to refuse to answer questions or otherwise give testimony against one's self. *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984).

---

[2] *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

In order to ensure the vitality of the privilege, this Court created rules to prevent trial courts and prosecutors from effectively punishing a defendant for exercising his right not to testify or his right not to respond to testimonial interrogation. In *Griffin*, this Court disapproved an instruction permitting the jury to take the defendant's failure to testify "into consideration as tending to indicate the truth" of "evidence or facts against him which the defendant can reasonably be expected to deny or explain." 380 U.S. at 610. The opinion similarly disapproved the prosecutor's statements in closing argument urging the jury to consider why the defendant had "not seen fit to take the stand and deny or explain." *Id.* at 611.[3] *Griffin* held that the court's instructions and the prosecutor's comments impermissibly burdened the exercise of the privilege against self-incrimination, "cut[ting] down on the privilege by making its assertion costly." *Id.* at 614.

Griffin was a murder case in which the defendant chose not to testify at trial and put the state to its proof on all elements. *See* 380 U.S. at 613 (describing "the prosecutor's comment and the court's acquiescence" as "the equivalent of an offer of evidence and its acceptance"). Acknowledging the proposition "that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge" is "natural and irresistible," *Griffin* distinguished "[w]hat the jury may infer, given no help from the court" from "[w]hat it may infer when the court solemnizes the silence of

---

[3] The prosecutor added that the murder victim "can't tell ... her side of the story" and "[t]he defendant won't." 380 U.S. at 611.

the accused into evidence against him." 380 U.S. at 614. Accordingly, *Griffin* held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615.

This Court advanced the doctrine further in *Carter*, finding constitutional error in the trial court's refusal to affirmatively instruct the jury, upon the defendant's request, that "[t]he [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." 450 U.S. at 294, 305. The decision rested on the premise that the penalty exacted for remaining silent "may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt." *Id.* at 301.

While *Carter* involved at least one inculpatory admission by the defendant to police, i.e., that two jackets found at the crime scene belonged to him,[4] the defendant again put the state to its proof. 450 U.S. at 294 (quoting prosecutor's closing argument in which he catalogues uncontroverted facts and states "that is all we have to go on"), *id.* at n. 6 (quoting defense counsel's closing argument in which he discusses the presumption of innocence, the state's burden to prove guilt beyond a reasonable doubt, and states that the defendant "doesn't have to take the stand in his own

---

[4] 450 U.S. at 294 n.5.

behalf" and "doesn't have to do anything"). The *Griffin* and *Carter* opinions make clear that the respective defendants stood on the presumption of innocence and required the state to prove the elements of the crimes.

Estelle likewise involved a contested fact – a fact relevant only to sentencing that rendered the defendant eligible for a death sentence. Specifically, the state had to prove "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," also characterized as "future dangerousness." 451 U.S. at 457. This Court was concerned that the defendant became the "deluded instrument of his own execution" when he submitted to a court-ordered, un-Mirandized pretrial psychiatric interview, and the state relied upon statements the defendant made during the interview to establish future dangerousness at the penalty phase trial. 451 U.S. at 462 (internal citations and quotations omitted). Accordingly, the Fifth Amendment now bars the use of a defendant's court-ordered pretrial disclosures at sentencing absent warnings or admonitions demonstrating an awareness of the privilege and the sentencing consequences of forgoing it. *Id.* at 467, 469.

Finally, in *Mitchell*, this Court applied the no-adverse-inference rule to contested facts at sentencing in a case where the defendant had entered a guilty plea. This Court held that the defendant's waiver of the Fifth Amendment privilege for purposes of establishing the factual basis of her guilty plea did not extend to contested facts relevant only to punishment. 526 U.S. at 325. Consequently, the Court held that the trial court erred in drawing adverse inferences as to

"factual determinations respecting the circumstances and details of the crime." *Id.* at 328. The contested fact in *Mitchell* was the quantity of cocaine the defendant had distributed, the resolution of which "may have resulted in decades of added imprisonment." *Id.* at 329.

B. Upholding the Sixth Circuit Decision Will Undermine the Fairness and Accuracy of Sentencing Proceedings Without Furthering Any Fifth Amendment Principle.

The concern underlying the *Carter* rule is that "without [a] limiting instruction," jurors will "speculate about *incriminating inferences* from a defendant's silence." *Carter*, 450 U.S. at 304 (emphasis supplied). The no-adverse-inference instruction only promotes Fifth Amendment values if there is actually an incriminating inference that the jury might draw from the defendant's decision not to testify. That necessarily means that at least one essential fact is at issue, as in *Griffin*, *Carter*, *Estelle*, and *Mitchell*.

In the sentencing context, an essential fact would be one that renders the defendant eligible for a greater punishment. *See Mitchell*, 526 U.S. at 316-17 (framing the issue as "whether, in determining facts about the crime *which bear upon the severity of the sentence*, a trial court may draw an adverse inference from the defendant's silence") (emphasis added). In the context of a capital sentencing proceeding, the no-adverse-inference instruction prevents a jury from considering the defendant's silence to establish a disputed fact that renders him eligible for the death penalty. *See Estelle*,

451 U.S. at 462 ("the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist" because the state used the respondent's statements to the psychiatrist as evidence establishing his future dangerousness).

Griffin, *Carter*, *Estelle*, and *Mitchell* share the critical feature lacking in Woodall's case: a contested issue of fact that either established guilt or exposed the defendant to increased punishment. In *Griffin*, *Carter*, *Estelle*, and *Mitchell*, this Court prohibited the fact finder from inferring the existence of the disputed fact from the defendant's silence.

In contrast, Woodall's guilty plea to the kidnapping and rape charges established the two statutory aggravating factors that subjected him to a capital sentence on the murder charge. Woodall expressly conceded the existence of the other adverse facts that the Commonwealth introduced during the penalty phase trial. *See* Joint Appendix at 69 (noting that the prosecutor "has talked to you about aggravating circumstances, and I said before, and I will tell you again, he did those things. We've not denied that. We've not offered a defense to that. He did those things."), 74-75 ("[W]hen you consider the punishment, you look at all of those things that [the prosecutor] asked you to look at, and again you look at all these things we've told you about his lifetime and the good things, too, before you make that decision."). Woodall admitted the facts that exposed him to the death penalty, and he conceded the remainder of the fact evidence offered by the Commonwealth at the penalty phase trial.

With no aggravating fact in dispute, the jury cannot have compromised Woodall's privilege against self-incrimination by drawing an adverse inference from his decision not to testify. There were no adverse inferences left to draw concerning any of the Commonwealth's proof. Before the jury deliberated, Woodall had either admitted (through his guilty plea) or conceded (through his attorney's statements) the aggravating facts rendering him eligible for the death penalty and all other relevant adverse facts. The Fifth Amendment concern in *Griffin*, *Carter*, *Estelle*, and *Mitchell* was absent in those circumstances. Accordingly, the trial court correctly declined to issue the no-adverse-inference instruction.

The Sixth Circuit's contrary conclusion lacks logic and finds no roots in this Court's case law. *Carter*, *Estelle*, and *Mitchell* cannot be read, together or individually, to require a no-adverse-inference instruction when the defendant's admissions and concessions leave no adverse inference to draw. The instruction invites ridicule if issued in such cases, as it commands the jury not to *infer* a fact that the defendant has already *established* through his prior admissible statements or his express concessions. The defendant's decision not to testify regarding admitted or conceded adverse facts is inconsequential. The testimonial privilege needs no protection from speculation because the defendant's prior statements and concessions leave nothing to speculate about.

Conversely however, the jury needs protection from inapplicable instructions that threaten to corrupt the verdict. When the trial court gives the no-adverse-inference instruction in a case where the defendant's

admissions and concessions establish the very facts that his testimony would otherwise address, the instruction can only confound a juror. The instruction necessarily assumes that facts within the defendant's knowledge are at issue. Consequently, it implies that the prosecution must prove something more – some other fact within the defendant's knowledge – in order to carry its burden of proof. The instruction causes rather than prevents speculation in these circumstances.

The jury will falter if it attempts to follow the instruction. A jury cannot both consider the defendant's actual statements in his guilty pleas *and* speculate about what the defendant's statements might be or why he chose not to speak. The instruction in these circumstances is not merely confusing, it is contradictory. It threatens the accuracy of the jury's deliberations and, therefore, the fairness of its verdicts. *Cf. Penry v. Johnson*, 532 U.S. 782, 799 (2001) (finding Eighth Amendment violation where internally contradictory instructions placed jurors in an impossible situation).

To be clear, the parties disputed aspects and implications of the mitigation evidence in Woodall's case. *See* Joint Appendix at 63-64, 71-74 (arguments addressing Woodall's intellectual capacity and upbringing). But the no-adverse-inference instruction does not apply to disputed mitigation evidence. Just as a jury cannot infer a fact the defendant has already admitted, it cannot incriminate a defendant based on his decision not to testify about contested *mitigation* evidence. Death eligibility turned on the Commonwealth's proof of aggravating factors beyond a

reasonable doubt, not on the existence of mitigation evidence. *See Kansas v. Marsh*, 548 U.S. 163, 175 (2006) (holding that "the States are free to determine the manner in which a jury may consider mitigating evidence" and that while "defendants [have] the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence," the thrust of this Court's mitigation jurisprudence ends there). Moreover, a state can constitutionally require a defendant to prove mitigating circumstances to avoid a death sentence, *see Walton v. Arizona*, 497 U.S. 639, 650 (1990) (overruled on other grounds in *Ring v. Arizona*, 536 U.S. 584 (2002)) or "to bear the risk of non-persuasion as to the existence of mitigating circumstances." *Delo v. Lashley*, 507 U.S. 272, 275 (1993) (*per curiam*) (quoting *Walton*, 497 U.S. at 650). *See also United States v. Constantine*, 263 F.3d 1122, 1129 (10th Cir. 2001) ("Because the burden [of proving mitigation] was his, the choice between invoking his right against self-incrimination and proving the applicability of mitigating circumstances was also his."); *Bonin v. Calderon*, 59 F.3d 815, 839-40 (9th Cir. 1995) (presenting defendant with the "Hobson's choice" of either remaining silent or admitting guilt and testifying about mitigating circumstances does not violate Fifth Amendment).[5]

---

[5] *Bonin* cites *McGautha v. California*, 402 U.S. 183, 220 (1971), which was later vacated on other grounds in light of *Furman v. Georgia*, 408 U.S. 238 (1972). However, as *Bonin* notes, *Furman* did not in any way "undercut the rationale of *McGautha* that a defendant can be forced to choose between testifying in mitigation and remaining silent on the issue of guilt." 59 F.3d at 840.

The jury cannot improperly relieve the state of a burden it does not have.

Consistent with that premise, this Court has limited its determination of "innocence" for capital sentencing purposes to those factors or elements that make the defendant eligible for the death penalty, excluding mitigating circumstances from the analysis. *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992) ("[T]he 'actual innocence' requirement [to overcome procedural default on habeas review] must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error."); *see also*, *Bell v. Thompson*, 545 U.S. 794, 812 (2005) (reiterating *Sawyer* standard); *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that the jury must find beyond a reasonable doubt only those facts that make the defendant eligible for the death penalty). Because the self-incrimination privilege is concerned with inferences of guilt or eligibility for greater punishment, this Court could not tether the *Carter* no-adverse-inference instruction to the defendant's decision not to testify regarding mitigation evidence. To do so would unsettle the framework for determining "innocence" in the capital sentencing context.

The Sixth Circuit decision ignored both the purposes of the *Carter* rule and the *Sawyer* implications. The trial court's putative error rested on the panel's observations that "the finding of the aggravating circumstances did not compel the jury to recommend a death sentence," and that the jury "could have rejected the death penalty even if it found the

existence of aggravating circumstances beyond a reasonable doubt." Pet. App. 10a. Those observations are correct but irrelevant. Of course the jury could have recommended a lesser sentence notwithstanding the uncontested aggravating facts: that is what Kentucky's capital sentencing regime contemplates, and that is why the penalty phase trial does not end with proof of an aggravating circumstance beyond a reasonable doubt. Given Woodall's guilty plea to the aggravating circumstances and his concession that "he did those things" that the Commonwealth proved at the penalty phase trial, the "grave doubt" that the death sentence "was not influenced by adverse inferences drawn from Woodall's decision not to testify" can only attach to the jury's evaluation of mitigation evidence, where the self-incrimination principle has no application. *Id.* at 11a.

The Sixth Circuit's decision prohibits adverse inferences from silence even where silence does not implicate self-incrimination. In jurisdictions such as Arizona, where capital sentencing proceedings squarely place the burden on the defendant to prove mitigating facts, it is more readily apparent that the Sixth Circuit's holding would indiscriminately prohibit permissible and impermissible inferences alike. This Court recognizes that the Fifth Amendment does not protect testimony that does not incriminate:

> [W]here there can be no further incrimination, there is no basis for the assertion of the privilege. We conclude that principle applies to cases in which the sentence has been fixed and the judgment of conviction has become final. If no adverse consequences can be visited upon the

> convicted person by reason of further testimony, then there is no further incrimination to be feared.

Mitchell, 526 U.S. at 326 (internal citation omitted). The Sixth Circuit panel's decision should be reversed because a defendant's silence regarding mitigation evidence cannot "incriminate" him at the point where the state has already proven the aggravating facts that permit imposition of the maximum punishment.

So it is here. Woodall's guilty plea established the aggravating facts that rendered him eligible for a capital sentence. He conceded every other adverse fact that the Commonwealth introduced, and defense counsel staked her sentencing strategy entirely on the jury's consideration of Woodall's own mitigation evidence. *See* Joint Appendix at 69-70 (defense counsel arguing to jury that in deciding punishment "you have the right to consider the things that he did, but you look at who he is, and you consider who he is"); 71 (describing the "suffering and the tragedy" in Woodall's early life); 73 (imploring the jury to keep its promise to "consider those things about him and his lifetime" before choosing the punishment); 74 (arguing that Woodall did not rise above his circumstances because "he's not smart, he's imperfect, he's flawed" and "[h]e lacked a support system"); 75 (stating, "I don't believe that God called us together today in this place for the purpose of killing another child of God"); 75-76 (likening punishment based on "[t]hose hours back in January of 1997" to opening a book at the middle, "read[ing] a few pages" and saying, "[y]es, I understand what that book was about"). Where a defendant admits and concedes all of the adverse facts and relies solely

on mitigation evidence to avoid the punishment for which the state has proven him eligible, no adverse consequences can "be visited upon him" by reason of further testimony, and there is "no further incrimination to be feared." *Mitchell*, 526 U.S. at 326. Consequently, as the Kentucky Supreme Court found, the no-adverse-inference instruction had no application.

CONCLUSION

This Court should reverse the Sixth Circuit decision and find that the no-adverse-inference instruction is impermissible in cases where the defendant does not contest the facts that render him guilty or eligible for increased punishment.

Respectfully submitted this 17th day of September, 2013.

THOMAS C. HORNE
ARIZONA ATTORNEY GENERAL
ROBERT L. ELLMAN
Counsel of Record
SOLICITOR GENERAL
1275 West Washington Street
Phoenix, AZ 85007
Phone (602) 542-3333
Fax (602) 542-8308
robert.ellman@azag.gov

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 18 2013
OFFICE OF THE CLERK

No. 12-794

IN THE

Supreme Court of the United States

RANDY WHITE, Warden,

Petitioner,

vs.

ROBERT KEITH WOODALL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1. Whether the Sixth Circuit, violated 28 U. S. C. § 2254(d)(1) by granting habeas relief on the trial court's failure to provide a no adverse inference instruction even though this Court has not "clearly established" that such an instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to the crimes and aggravating circumstances.

2. Whether the Sixth Circuit violated the harmless error standard in *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), in ruling that the absence of a no adverse inference instruction was not harmless in spite of overwhelming evidence of guilt and in the face of a guilty plea to the crimes and aggravators.

This brief *amicus curiae* addresses Question 1.

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I

Section 2254(d) requires more objective definition to achieve Congress's primary objective 5

II

A decision is not "contrary to" a Supreme Court precedent if the precedent itself declares the issue to be a separate question from the one it decides 7

III

A state court's decision not to extend a Supreme Court precedent beyond its existing scope is *per se* not an "unreasonable application" 10

Conclusion 16

TABLE OF AUTHORITIES

Cases

Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) 7

Carey v. Musladin, 549 U. S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) 14

Carter v. Kentucky, 450 U. S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981) 8, 12

Chaidez v. United States, 568 U. S. __, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013) 15

Cullen v. Pinholster, 563 U. S. __, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) 6

Estelle v. Smith, 451 U. S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) 8, 9

Felkner v. Jackson, 562 U. S. __, 131 S. Ct. 1305, 179 L. Ed. 2d 374 (2011) 6

Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) 12

Harrington v. Richter, 562 U. S. __, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) 5, 6, 7

Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908) 12

Lafler v. Cooper, 566 U. S. __, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) 15

Mitchell v. United States, 526 U. S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) 2, 3, 8, 9, 10, 12, 13

Panetti v. Quarterman, 551 U. S. 930,
127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007) ... 14, 15

Parker v. Matthews, 567 U. S. __, 132 S. Ct. 2148,
183 L. Ed. 2d 32 (2012) 6

Sawyer v. Whitley, 505 U. S. 333, 112 S. Ct. 2514,
120 L. Ed. 2d 269 (1992) 3

Teague v. Lane, 489 U. S. 288, 109 S. Ct. 1060,
103 L. Ed. 2d 334 (1989) 15

Williams v. Taylor, 529 U. S. 362, 120 S. Ct. 1495,
146 L. Ed. 2d 389
(2000) 4, 5, 7, 8, 10, 11, 12, 14, 15, 16

Woodall v. Commonwealth, 63 S. W. 3d 104
(Ky. 2001) 2

Woodall v. Simpson, 685 F. 3d 574
(CA6 2012) 3, 12, 16

Yarborough v. Alvarado, 541 U. S. 652,
124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) 14

United States Statute

28 U. S. C. § 2254 ..... 4, 7, 13

Secondary Authorities

King, N., Cheesman, F., & Ostrom, B.,
Final Technical Report: Habeas Litigation in
U. S. District Courts (2007) 5

Scheidegger, Habeas Corpus, Relitigation, and
the Legislative Power, 98 Colum. L. Rev. 888
(1998) 13

IN THE

Supreme Court of the United States

RANDY WHITE, Warden,

Petitioner,

vs.

ROBERT KEITH WOODALL,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the just punishment for the horrible crime of the kidnapping, rape, and murder of

---

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

a 16-year-old girl has been needlessly delayed for 7 years and counting after the state courts' thorough review of the case was completed. This extended delay has occurred in a case of no doubt of guilt, no doubt of the circumstances of the crime, and only the flimsiest mental claims made against the perpetrator's eligibility for the punishment. In other words, there is no possibility of a miscarriage of justice in this case. Such needless delay in the execution of a clearly just punishment is contrary to the rights of victims of crime that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In 1997, Sarah Hansen was 16 years old. She was a "high school cheerleader, an honor student, a musician, a member of the National Honor Society and the Beta Club and a medalist in swimming and diving." *Woodall* v. *Commonwealth*, 63 S. W. 3d 104, 114 (Ky. 2001). On January 25, she went out to rent a movie and never returned. Robert Keith Woodall kidnapped her, raped her, slashed her throat, and dumped her in a lake. The overwhelming evidence included fingerprints and DNA. Woodall pleaded guilty and admitted the aggravating circumstances. See *id.*, at 114-115.

Woodall did not testify at the penalty phase. The trial judge refused his request to instruct the jury not to draw any adverse inference from the fact he had not testified. On appeal, the Kentucky Supreme Court found that this refusal was not error and in the alternative that any error was harmless. See *id.*, at 115. The state court considered and distinguished three precedents of this Court. In particular, *Mitchell* v. *United States*, 526 U. S. 314 (1999), was distinguishable because in that case, "the U. S. Supreme Court ruled that it would not permit a negative inference to be

drawn about [the defendant's] guilt with regard to the factual determination respecting the circumstances and details of the crime. Here, Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes." *Ibid.*

Following direct review, two collateral attacks on the sentence were denied by the state circuit court. These denials were affirmed by the Kentucky Supreme Court, and this Court denied certiorari. See App. to Pet. for Cert. 34a-35a (District Court opinion). This stage of review took another four years.

Seven years ago, Woodall filed a federal habeas petition with 30 claims. See App. to Pet. for Cert. 35a-37a. His claim of mental retardation was not supported by any credible evidence. See App. to Pet. for Cert. 147a. He claimed that his lawyers should have presented an insanity defense, but the defense expert found no evidence of thought disorder or psychosis. See App. to Pet. for Cert. 155a. Aside from these factually unsupported claims, Woodall's claims did not contend that he was innocent of the crime or ineligible for the penalty. That is, there is no substantial claim in this case of a miscarriage of justice. Cf. *Sawyer* v. *Whitley*, 505 U. S. 333, 339, 346-347 (1992).

The magistrate judge recommended denial of all claims. The District Court granted relief on claim one, the no-adverse-inference instruction claim presently before this Court, and claim two, a claim on jury selection. The District Court granted a certificate of appealability on claim five, instruction on mitigation. See App. to Pet. for Cert. 31a, 35a. The Court of Appeals for the Sixth Circuit affirmed on the first claim and declined to reach the others. *Woodall* v. *Simpson*, 685 F. 3d 574, 578 (2012). This Court granted certiorari on June 27, 2013.

SUMMARY OF ARGUMENT

The purpose of Congress in enacting habeas corpus reform in the Antiterrorism and Effective Death Penalty Act of 1996 was "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." The first of these goals has clearly not been achieved. More concrete rules are required to expedite the processing of habeas cases, especially capital cases, and achieve the goals of the statute.

A federal court in habeas corpus is authorized to override a state court decision on the merits when it is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U. S. C. § 2254(d)(1). While the scope of a rule established by a precedent is sometimes a difficult question, this case suggests a bright line rule that can simplify and speed the decision in many cases. The state court's decision on a question of law cannot be contrary to a Supreme Court precedent when that precedent expressly distinguishes the question from the one it is deciding.

In *Williams* v. *Taylor*, 529 U. S. 362, 407-408 (2000), this Court noted but did not endorse a prior holding by the Fourth Circuit that a state court decision could be an "unreasonable application" of Supreme Court precedent if it "unreasonably refuses to extend that principle to a new context where it should apply." The Court of Appeals in the present case incorrectly attributed this statement to the *Williams* Court itself. This language should now be expressly disapproved. As the present case illustrates, it threatens to enable lower federal courts to smuggle in the back door exactly the kind of rulings that Congress sought to bar when it limited "clearly established Federal law" to the precedents of this Court. The "unreasonable application"

clause should be limited to the application of this Court's precedents to particular facts, not extension of those precedents to new territory.

ARGUMENT

I. Section 2254(d) requires more objective definition to achieve Congress's primary objective.

Congress enacted the habeas corpus chapter of the Antiterrorism and Effective Death Penalty Act of 1996 "'to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law.'" *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000) (quoting opinion of Justice Stevens in the same case). "It cannot be disputed that Congress viewed [28 U. S. C.] § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Ibid.*

It also cannot be disputed that goal number one, curbing delays, has not been achieved. A study in 2007 found that capital habeas filings were "taking at least twice as long to finish, on average, than prior to AEDPA." N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U. S. District Courts 60 (2007). That figure does not necessarily mean that AEDPA was the cause of increased delay, but it does mean that the principal purpose of the Act to reduce delay was not achieved.

The principal purpose was not achieved because the law was not implemented the way Congress intended it. "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court," with two exceptions. *Harrington* v. *Richter*, 562 U. S. __, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624, 638 (2011). The

first, most commonly litigated exception, sets a standard that "is difficult to meet . . . because it was meant to be." *Id.*, 131 S. Ct., at 786, 178 L. Ed. 2d, at 641. In other words, cases meeting the standard are supposed to be rare. Review of the state court decision on the factual record in the state court, see *Cullen* v. *Pinholster*, 563 U. S. __, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557, 569 (2011), to determine whether "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents," *Richter*, *supra*, 131 S. Ct., at 786, 178 L. Ed. 2d, at 641, should be a quick matter for nearly all claims. No discovery or evidentiary hearing is required to decide a claim on the state court record. Decisions so patently wrong as to meet the *Richter* standard rarely occur and are obvious when they do.

A heavy share of the blame for the failure to implement the law as intended rests with certain judges of the federal courts of appeals and district courts. In case after case, this Court has found shocking disregard of the statutory mandate. For example, in *Parker* v. *Matthews*, 567 U. S. __, 132 S. Ct. 2148, 2149, 183 L. Ed. 2d 32, 34-35 (2012) (*per curiam*),

> "the United States Court of Appeals for the Sixth Circuit set aside two 29-year-old murder convictions based on the flimsiest of rationales. The court's decision is a textbook example of what . . . (ÀEDPA) proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.' "

In *Felkner* v. *Jackson*, 562 U. S. __, 131 S. Ct. 1305, 1307, 179 L. Ed. 2d 374, 378 (2011) (*per curiam*), "The state appellate court's decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner." In *Richter*, *supra*, the

Court of Appeals "explicitly conducted a *de novo* review" and "all but ignored 'the only question that matters under § 2254(d)(1)' " 131 S. Ct., at 786, 178 L. Ed. 2d, at 640. Not since the "massive resistance" campaign in the wake of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), has there been such widespread defiance of the law of the land by officials with a duty to enforce it.

Yet this Court also bears a share of the responsibility. When experience shows that a rule of law expressed in general terms has provided too much leeway for evasion and that such evasion is widespread, it is time to establish more concrete rules. *Pinholster* and *Richter* are important steps toward making AEDPA effective in achieving Congress's goals, but more needs to be done. This case suggests two specific rules that can be established to facilitate prompt decision of the § 2254(d) question in a significant number of cases. First, a proposed rule is not "clearly established" by this Court's precedents if the most recent case in the series expressly distinguishes the question and declines to express an opinion on it. Second, it is time to officially lay to rest the notion that extension of this Court's precedents into new territory on habeas corpus can be smuggled in through the back door via the "unreasonable application" clause.

II. A decision is not "contrary to" a Supreme Court precedent if the precedent itself declares the issue to be a separate question from the one it decides.

Williams v. *Taylor*, 529 U. S. 362 (2000), was this Court's first thorough examination of the standard enacted by Congress in 28 U. S. C. § 2254(d).

> "In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) 'was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.' Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*, at 412-413.

Both the state and federal courts in this matter understood that three principal Supreme Court precedents require consideration: *Carter* v. *Kentucky*, 450 U. S. 288 (1981), *Estelle* v. *Smith*, 451 U. S. 454 (1981), and *Mitchell* v. *United States*, 526 U. S. 314 (1999). See Brief for Petitioner 10-11, 14-16 (summarizing decisions). Of these, *Mitchell* is both the most recent and the closest to the point. Only *Mitchell* involves a silent defendant in the penalty phase of a case. See 526 U. S., at 328. *Carter* involved a request for an instruction in the guilt phase, see 450 U. S., at 294, and *Smith* involved testimony based on an interview with the

defendant introduced as positive evidence against him. See 451 U. S., at 459-460.

Applying *Williams*, the first question is whether the Kentucky Supreme Court "arrive[d] at a conclusion opposite to that reached by this Court on a question of law" in *Mitchell*. That would only be possible if both cases address the same question of law. In some cases, determining the scope of the question may be difficult, but not in *Mitchell*. The answer is crystal clear on the face of the opinion.

Right out of the gate, *Mitchell* tells us that it addresses two questions, one of which is pertinent here. "The second question is whether, in determining *facts about the crime* which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence. We hold a sentencing court may not draw the adverse inference." 526 U. S., at 316-317 (emphasis added). After noting the general rule against negative inferences from failure to testify, *Mitchell* holds, "We decline to adopt an exception for the sentencing phase of a criminal case *with regard to factual determinations respecting the circumstances and details of the crime*." *Id.*, at 328 (emphasis added).

Why does the *Mitchell* Court repeatedly go out of its way to specify facts, circumstances, and details *of the crime* as the inferences forbidden by its rule? The answer comes at the end.

> "The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege. Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guide-

lines (1998), *is a separate question*. It is not before us, and we express no view on it." *Id.*, at 330 (emphasis added).

This is as clear as it gets. There is an important distinction between using the defendant's silence to infer facts about the crime on which the government has the burden of proof and considering such silence when determining if the defendant has established reasons to sentence him to less than he otherwise deserves. The arguments against use of silence are less potent in the latter situation, which is the present case, and that difference is sufficient to make it a different question.

The separateness of the two questions is beyond dispute in this case, because the *Mitchell* opinion expressly says that the question it decided does not include the latter. The state court therefore did not decide a question of law opposite to a decision of this Court. The state court also did not decide a case on "materially indistinguishable facts," because *Mitchell* expressly distinguishes the two situations. A federal habeas court cannot grant relief under the "contrary to" prong of § 2254(d)(1).

III. A state court's decision not to extend a Supreme Court precedent beyond its existing scope is *per se* not an "unreasonable application."

In *Williams v. Taylor*, 529 U. S. 362, 407 (2000), the Court indicated that "[t]he Fourth Circuit's interpretation of the 'unreasonable application' clause of § 2254(d)(1) is generally correct." The word "generally" is important here. Summarizing the Fourth Circuit's interpretation, not its own, the *Williams* Court said,

> "a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. See [*Green* v. *French*,] 143 F. 3d [865] at 869–870." *Ibid.*

The *Williams* Court was dubious about this portion of the interpretation.

> "Although that holding *may perhaps be correct*, the classification does have some problems of precision. Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context. Indeed, on the one hand, in some cases it will be hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts. On the other hand, in many of the same cases it will also be difficult to distinguish a decision involving an unreasonable extension of a legal principle from a decision that 'arrives at a conclusion opposite to that reached by this Court on a question of law,' *supra*, at 405. *Today's case does not require us to decide* how such 'extension of legal principle' cases should be treated under § 2254(d)(1). For now it is sufficient to hold that when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provi-

> sion's 'unreasonable application' clause." 529 U. S., at 408-409 (emphasis added).

"May perhaps be correct" is hardly a ringing endorsement, yet the Court of Appeals in the present case quoted the *Williams* Court's summary of *Green* v. *French* as if it were a holding of *Williams* itself. See *Woodall* v. *Simpson*, 685 F. 3d 574, 579 (CA6 2012). That it most assuredly is not. *Williams* expressly disclaimed any decision on this point and omitted any "extension" language from its own statement of the rule, quoted *supra*, at 8.

The present case illustrates once again the wisdom of Justice Holmes's famous statement for the Court in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908):

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

Just where that point is located is a matter of opinion, and until this Court renders the authoritative word, courts that are not bound to follow each other's precedents may legitimately disagree.

Griffin v. *California*, 380 U. S. 609 (1965), was a stretch from the actual constitutional right of self-incrimination, so much so that four Justices of this Court agreed it was "a breathtaking act of sorcery" that ought not be further extended. See *Mitchell* v. *United States*, 526 U. S. 314, 336 (1999) (Scalia, J., dissenting). Yet *Carter* v. *Kentucky*, 450 U. S. 288 (1981), did extend *Griffin* from a ban on affirmative use to a right to a prophylactic jury instruction, and *Mitchell*, by the barest of majorities, extended it in a different dimen-

sion to a ban on affirmative use of silence in the sentencing phase to prove facts relevant to the crime on which the government has the burden of proof. See 526 U. S., at 330. With each proposed extension, the case for extension grows weaker and the countervailing policies grow stronger. Is the use of defendant's silence to negate the mitigating factor of remorse beyond the "certain point" where the countervailing policies "become strong enough to hold their own"? The *Mitchell* Court expressly declined to decide that question, as it is a separate one and was not before the Court. See *ibid.*

Allowing the lower federal courts in habeas corpus to substitute their judgment for the considered opinions of the state courts on these difficult questions of law is exactly what Congress sought to prevent when it limited "clearly established Federal law" for the purpose of § 2254(d)(1) to that "determined by the Supreme Court of the United States." This Court is unique as the only federal court with the authority to establish precedents that are binding on state court. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 898-899 (1998). A state court that disagrees with a lower federal court's precedent may very well be right, as "right" is subsequently determined by this Court, and Congress inserted this phrase to allow state courts to make their own judgments, limited only by this Court's precedents. See *id.*, at 947-948.

Adopting the *Green* v. *French* "extension" language, as the Court of Appeals did in the present case, would let in through the back door the very kinds of decisions that Congress barred from the front door. Instead, that language should be expressly repudiated. The first step is to determine the "clearly established Federal law as determined by the Supreme Court of the United

States." If the state court considered the relevant Supreme Court precedents and none establishes a rule governing the situation before it, the federal habeas court can stop at that point and deny relief on that claim.

In some cases, of course, the scope of the rule established by a Supreme Court precedent will be debatable, and this Court has noted the difficulty of that decision more than once. See, *e.g.*, *Yarborough* v. *Alvarado*, 541 U. S. 652, 666 (2004); *Williams* v. *Taylor*, *supra*, 529 U.S., at 408. Certainly a Supreme Court precedent does not have to be made on indistinguishable facts before the question becomes one of applying an existing rule to specific facts versus extending a rule to new territory. See *Panetti* v. *Quarterman*, 551 U. S. 930, 953 (2007).

Carey v. *Musladin*, 549 U. S. 70 (2006), illustrates the distinction. The Court of Appeals took two Supreme Court precedents regarding state-sponsored displays in the courtroom and extended them to purely private actions. That was error under § 2254(d)(1). See *id.*, at 75-77. Concurring in the judgment, Justice Kennedy noted that there were other Supreme Court precedents involving prejudicial actions at trial by private actors, but those cases involved far more inflammatory acts than the spectator buttons at issue in *Musladin*. See *id.*, at 80-81. If the claim had been made under these precedents, the § 2254(d)(1) question would have involved the "application" clause, but rejection of the claim would have been reasonable. A broad rule may furnish the applicable rule, but the state court has great leeway in its application. See *Alvarado*, 541 U. S., at 664. A narrower rule gives the state court less leeway where it applies, but the state court's refusal to extend it to new territory is not a ground for federal habeas relief.

This discussion presupposes that the state court actually does grapple with the extension question, as the Kentucky Supreme Court did in the present case. "When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti*, 551 U. S., at 953. *Lafler* v. *Cooper*, 566 U. S. __, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), arguably involved extension of a rule into new territory. See *id.*, 132 S. Ct., at 1395-1396, 182 L. Ed. 2d, at 418-419 (Scalia, J., dissenting). If the state court had decided on that basis, a more difficult AEDPA question would have been presented. However, the state court in *Cooper* made an antecedent error rendering its decision "contrary to clearly established federal law," satisfying the AEDPA requirement. See *id.*, 132 S. Ct., at 1390, 182 L. Ed. 2d, at 413 (citing *Panetti*). In contrast, *Chaidez* v. *United States*, 568 U. S. __, 133 S. Ct. 1103, 1105, 185 L. Ed. 2d 149, 154 (2013), found that an extension of the right of effective assistance of counsel into new territory was a "new rule" for the purpose of *Teague* v. *Lane*, 489 U. S. 288 (1989), which is generally equivalent to finding it is not "clearly established" for the purpose of § 2254(d)(1). See *Williams* v. *Taylor*, 529 U. S., at 412.

The extension language of *Green* v. *French* is unnecessary, dangerous, and potentially misleading. It is time to officially lay it to rest. If the existing Supreme Court precedents really do require extension to reach the case before the state court, it lies within that court's authority to decide whether the extension is warranted. That decision is subject to review only by this Court by writ of certiorari and not by the lower federal courts by writ of habeas corpus. The purpose of federal habeas is only to enforce the state courts' duty

to obey precedents binding on them, not to "push the envelope," further expanding the already large federal intrusion into state procedure. The "unreasonable application" clause of § 2254(d)(1) is limited to the application of existing rules to particular facts. The statement of the rule in *Williams* v. *Taylor*, 529 U. S., at 412-413, quoted *supra*, at 8, is complete.

The Kentucky Supreme Court was correct that no precedent of this Court forbids consideration of the defendant's silence in the absence of disputed facts about the crime or requires a prophylactic jury instruction in those circumstances. See *Woodall* v. *Simpson*, 685 F. 3d, at 581 (Cook, J., dissenting). The authority of the federal habeas court stops there.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

September, 2013

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

AMICUS CURIAE BRIEF

No. 12-794

In The
Supreme Court of the United States

RANDY WHITE,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE LOS ANGELES COUNTY PUBLIC DEFENDER'S OFFICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

RONALD L. BROWN, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA
Albert J. Menaster
Counsel of Record
Robin Bernstein-Lev
Deputy Public Defenders
320 West Temple Street, Suite 590
Los Angeles, CA 90012
Tel. No. (213) 974-3058
AMenaster@pubdef.lacounty.gov
RBernstein-Lev@pubdef.lacounty.gov
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

THE FIFTH AMENDMENT REQUIRES THAT A CRIMINAL TRIAL JUDGE MUST GIVE A "NO ADVERSE INFERENCE" JURY INSTRUCTION WHEN REQUESTED BY A DEFENDANT 5

A. Jurors' Natural Inclination Is to Give Aggravating Weight to the Defendant's Decision Not to Testify 5

B. Upholding the Sixth Circuit Decision Will Promote the Fairness and Accuracy of Sentencing Proceedings 7

C. Silence Which Is the Product of a Criminal Defendant's Decision Not to Testify Cannot Be Reliably Interpreted 10

i. Defendants with mental or intellectual disabilities 12

ii. Youth 14

iii. Environmental influences 15

iv. Uncooperative defendants 16

v. Innocence 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Carter v. Kentucky,
450 U.S. 288(1981).....3, 5, 7, 8,9

Clemons v. Mississippi,
494 U.S. 738 (1990).....9

Doyle v. Ohio,
426 U.S. 610 (1976).....11, 12, 14

Estelle v. Smith,
451 U.S. 454 (1981).....3

Lakeside v. Oregon,
435 U.S. 333 (1978).....6, 7

Lockett v. Ohio,
438 U.S. 586, (1978).....4, 8, 9, 19

Mitchell v. United States,
526 U.S. 314 (1999).....8

People v. Snow,
30 Cal.4th 43 (2003).....17

Porter v. McCollum,
558 U.S. 30 (2009).....17

Salinas v. Texas,
__U.S.__ (2013).....11

Walton v. Arizona,
497 U.S. 639 (1990).....4, 9

Woodson v. North Carolina,
428 U.S. 280 (1976).....8

Zant v. Stephens,
462 U.S. 862 (1983).....20

MISCELLANEOUS

5 J. Bentham, Rational of Judicial Evidence 209 ... 6

8 J. Wigmore, Evidence 2272 ..... 6, 7

Craig Haney, The Psychological Impact of Incarceration: Implications for Post-prison Adjustment 16

The Death Penalty, Innocence Project 18

Dieter, Richard, The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All 2

Doris J. James & Lauren E. Glaze, Mental Health Problems of Prison and Jail Inmates 11, 12, 13

Jules Epstein, Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding 'Lack of Remorse' Testimony and Argument in Capital Proceedings, 14 Temple Pol. & Civ. Rts. L. Rev. 45 (Fall, 2004) 15

Michele LaVigne & Gregor Van Rybroek, "He got in my face so I shot him": How defendant's language impairments impair attorney-client relationships, University of Wisconsin Law School, Series Paper No. 1228 13

Sowell et al., In vivo evidence for post-maturation in frontal and striatal regions, 2 Nature Neuroscience 10 (1999) 14, 15

INTEREST OF *AMICUS CURIAE* [1]

The Los Angeles County Public Defender (LACPD) is primary trial counsel in the County of Los Angeles for all persons who, charged with crimes, are indigent and unable to afford private counsel. The Los Angeles County Public Defender protects the life and liberty of adults and children in matters having penal consequences. LACPD's mandate is to ensure equal treatment within the justice system by safeguarding liberty interests and upholding the rights of individuals.

Established in 1914, the Los Angeles County Public Defender's Office is both the oldest and largest full service local governmental defender in the United States, with offices in 39 locations

---

1. Counsel for each party has consented to the filing of this Brief, as indicated by letters filed with the Clerk of the Court. SUP. CT. R. 37.6. Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

throughout the county with over 700 lawyers.[2] LACPD handles approximately 70% of felony and 55% of misdemeanor cases prosecuted in the county. Its caseload includes roughly 90,000 felony, 400,000 misdemeanor, and 40,000 juvenile cases and 60 capital cases each year.[3] It also provides representation for some 12,000 persons in mental health commitment proceedings as well as a variety of other matters. LACPD also provides capital litigation training for attorneys, paralegals, and investigators of the Public Defender, Alternate

---

2. Los Angeles County is one of the most active jurisdictions in the nation in terms of the number of capital defendants sentenced to death, according to a study conducted by The Death Penalty Information Center. "In 2009 Los Angeles County, California sentenced the same number of people to death as the State of Texas." Dieter, Richard, *The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All*, Death Penalty Information Center (2013), available at deathpenaltyinfo.org/documents/TwoPercentReport.pdf. In 2012 Los Angeles County was ranked number six in the nation amongst leading counties in death sentences. *Ibid.*

3. The number of capital cases handled by the LACPD is highly dynamic given the size of Los Angeles County and the number of cases filed by the Los Angeles County District Attorney. Additionally, some cases are settled by a plea bargain, some are given a "Life Letter" (meaning the District Attorney elects not to seek the death penalty), special circumstance allegations qualifying the defendant for the death penalty are removed, or a conflict of interest requires the LACPD to recuse the office from the case. Given the nature of capital case preparation, a true death case will remain open for years before the trial commences.

Public Defender, and Federal Public Defender, as well as the private defense bar.

Amicus Curiae, as the largest criminal defense firm in the nation, has a strong interest in protecting the fairness and accuracy of criminal sentencing proceedings, especially in capital cases. The decision whether a criminal defendant testifies during the penalty phase of trial is a decision made with "the guiding hand of counsel" and requires consideration of many factors that are unique to each defendant and the nuances of each case. *Estelle v. Smith*, 451 U.S. 454, 471 (1981). *Amicus curiae* will elucidate some of the reasons why a criminal defendant does not testify at a penalty trial and why a *Carter* instruction is necessary to protect the integrity of capital sentencing proceedings. *Carter v. Kentucky*, 450 U.S. 288, 303 (1981).

SUMMARY OF THE ARGUMENT

The Sixth Circuit decision appropriately applied this Court's established precedent when it recognized that criminal defendants have a clearly established constitutional right to a requested "no adverse inference" instruction during the penalty phase of a capital trial where the defendant does not testify. A *Carter* instruction is constitutionally required to prevent jurors from giving evidentiary weight to a defendant's failure to testify.

Jurors are naturally inclined to draw adverse inferences from the defendant's silence. Without

this limiting instruction the defendant's election not to testify becomes weighted in favor of aggravation as jurors speculate and attribute the defendant's silence to negative character traits. "The burden of establishing the existence of any of the aggravating circumstances is on the prosecution." *Walton v. Arizona*, 497 U.S. 639, 643 (1990). Permitting the jury to infer aggravation from the defendant's failure to testify gives the government an unearned non-statutory aggravator which the jury will consider.

Silence which is the product of a criminal defendant's decision not to testify cannot be reliably interpreted. A defendant's decision not to testify at sentencing is based upon a variety of considerations including those that focus on the defendant's ability to effectively communicate. Silence is particularly susceptible to misinterpretation when it is taken out of context. When a defendant remains silent and elects not to testify during sentencing proceedings, there are too many variables to permit anyone to draw any reliable inferences from that silence, and any attempt to draw adverse inferences would be based upon caprice and speculation. A penalty phase trial that allows jurors to make life and death decisions based upon ambiguous and speculative evidence offends the principle that "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

ARGUMENT

THE FIFTH AMENDMENT REQUIRES THAT A CRIMINAL TRIAL JUDGE MUST GIVE A "NO ADVERSE INFERENCE" JURY INSTRUCTION WHEN REQUESTED BY A DEFENDANT

> No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum. . . . Accordingly, . . . a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.

Carter, 450 U.S. 288, 303 (1981).

A. Jurors' Natural Inclination Is to Give Aggravating Weight to the Defendant's Decision Not to Testify.

"It has been almost universally thought that juries notice a defendant's failure to testify. '[The] jury will, of course, realize this quite evident fact,

even though the choice goes unmentioned. . . . [It is] a fact inescapably impressed on the jury's consciousness.'" *Carter*, 450 U.S. 288, 301 n.18 (1981). It is doubtful that "jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own." *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978).

The assumption by *Amicus* of Arizona and Other States that "there . . . is no possibility that a jury will presume the existence of an adverse fact based on the defendant's silence" (Arizona Brief, p.4) is as dubious today as it was when it was discredited by this Court in *Lakeside*, 435 U.S. at 340, (noting "Federal constitutional law cannot rest on speculative assumptions so dubious as these"). As Justice Stewart noted, it is human nature to ascribe adverse inferences to a defendant's failure to testify:

> It has often been noted that such inferences may be inevitable. Jeremy Bentham wrote more than 150 years ago: "[B]etween delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable." 5 J. Bentham, *Rational of Judicial Evidence* 209 (1827). And Wigmore, among many others, made the same point: "What inference does a plea of privilege support? The layman's natural first

> suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." 8 J. Wigmore, *Evidence* § 2272, p. 426 (McNaughton rev. 1961).

Lakeside, 435 U.S. 333, 348 n.10 (1978).

In *Lakeside* the trial court forced a "no adverse inference" instruction on the defendant. This Court held that ". . . .[t]he salutary purpose of the instruction, 'to remove from the jury's deliberations any influence of unspoken adverse inferences,' was deemed so important that it there outweighed the defendant's own preferred tactics." *Carter*, 450 U.S. at 301.

B. Upholding the Sixth Circuit Decision Will Promote the Fairness and Accuracy of Sentencing Proceedings.

In *Carter* this Court recognized that the Fifth Amendment is a broad privilege.

> [It] reflects many of our fundamental values and most noble aspirations: our willingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which

> dictates 'a fair state-individual balance by requiring the government . . . , in its contest with the individual to shoulder the entire load,' . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' [Citation.]

Carter, 450 U.S. at 299.

These pillars of the Fifth Amendment privilege apply equally to sentencing proceedings. "Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony." *Mitchell v. United States*, 526 U.S. 314, 326 (1999). Nowhere is the fear of adverse consequences more palatable than when a defendant faces the ultimate penalty of death.

For this reason, death penalty proceedings stand apart from ordinary sentencing proceedings and require the highest degree of reliability.

> By now it is settled law that 'the penalty of death is qualitatively different' from any other sentence, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), and that 'this qualitative difference between

> death and other penalties calls for a greater degree of reliability when the death sentence is imposed,' *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion).

Clemons v. Mississippi, 494 U.S. 738, 772 (1990) (Brennan J., concurring and dissenting). These principles make it imperative to "use the unique power of the jury instruction to reduce that speculation to a minimum." *Carter*, 450 U.S. at 303.

It is not consistent with the "fair play" pillar of the Fifth Amendment to relieve the State of its "burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances . . . ." *Walton v. Arizona*, 497 U.S. 639, 650 (1990) (holding that a death penalty statute must not preclude consideration of relevant mitigating factors). If jurors are permitted to draw an adverse inference from the defendant's failure to testify, the government is relieved of its obligation to "prove the existence of aggravating circumstances." This type of "freebie" aggravation offends basic principles of fair play.

More importantly, "the need for individualized consideration [is] a constitutional requirement in imposing the death sentence." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Drawing an adverse inference against a criminal defendant who elects not to testify in the penalty phase of the trial offends the

principles of individualized consideration by painting all non-testifying defendants with the same scarlet letter of suspicion without regard to their individualized reasons for not testifying. As is discussed more fully, *infra*, a defendant's decision whether to testify is based on many factors unique to each defendant and the issues in the case.

> The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Ibid.

C. Silence Which Is the Product of a Criminal Defendant's Decision Not to Testify Cannot Be Reliably Interpreted.

Silence is particularly susceptible to misinterpretation when it is taken out of context. A defendant's decision not to testify at sentencing is based upon a variety of considerations including those that focus on the defendant's ability to effectively communicate.

There are many reasons why a defendant may not testify during the penalty phase of a trial. This Court recognizes that:

> not everyone . . . can safely venture on the witness stand . . . . Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand.

Carter, 450 U.S. at 300.

The intrinsic ambiguity of silence was recognized last term by this Court in *Salinas v. Texas*, __ U.S. __; 133 S.Ct. 2174 (2013). In *Salinas*, this Court rejected the claim that Mr. Salinas's silence during his interview by the police must have been an invocation of the Fifth Amendment privilege, saying:

> But whatever the most probable explanation, such silence is "insolubly ambiguous." See *Doyle, v. Ohio*, 426 U. S. 610, 617 (1976). To be sure, someone might decline to answer a police

> officer's question in reliance on his constitutional privilege. But he also might do so because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else. Not every such possible explanation for silence is probative of guilt, but neither is every possible explanation protected by the Fifth Amendment. Petitioner alone knew why he did not answer the officer's question, and it was therefore his "burden . . . to make a timely assertion of the privilege."

Id. at 2182; citation omitted.

Similarly, a defendant's silence by not testifying at the penalty phase of a capital trial is inherently ambiguous. The reasons why a defendant would not testify during the penalty phase of a trial are nuanced and complex. Each defendant and case is unique so there can be no "one size fits all" explanation for the decision whether or not to testify. This is precisely why it is imperative that jurors and judges refrain from drawing adverse inferences from the defendant's decision not to testify.

i. Defendants with mental or intellectual disabilities.

An inarticulate defendant makes a poor witness. Defendants who struggle with mental

illness, emotional, learning, or intellectual disabilities are more likely to avoid the witness stand simply because they do not have the skills necessary to be a successful witness.[4] Many defendants are on a medication regime that interferes with their ability to testify effectively.

"[W]ithin juvenile and adult correctional institutions language disorders have been found at rates ranging from three to ten times that of the general population." Michele LaVigne & Gregory Van Rybroek, *"He got in my face so I shot him": How defendant's language impairments impair attorney-client relationships,* University of Wisconsin Law School, Series Paper No. 1228 at 4, available at http.ssrn.com/abstract=2314546.[5] Defendants who suffer from a learning disability are at a disadvantage during direct examination and especially cross examination.

---

4. A U.S. Department of Justice study in 2005 showed that 56.2% of State prison inmates and 64.2% of local jail inmates suffered from mental health problems, including major depression, mania, and psychotic disorders. Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates,* U.S. Department of Justice, Dec. 14 2006, at 2-3, available at

http://www.bjs.gov/content/pub/pdf/mhppji.pdf. Comparatively, only 10.6% the general population in the United States over the age of 18 report any symptoms of a mental disorder. *Id.* at 3.

5. This Legal Studies Research Paper is scheduled to be published in the CUNY Law Review, Vol. 17 in 2014.

> Due to their weak narrative skills "impaired individuals have difficulty relating a story that could be understood by the listener who does not share the same experience or knowledge. They tend to describe 'significantly fewer bits of information about the context of the story and the events that initiated it.' . . . [They] are less able to describe a character's plan, the cause and effects of the character's actions, and the character's motivations. Researchers have expressed particular concern over how these young men would have fared when they attempted to 'tell their story in the forensic context.'"

Id. at 24-25.

Attorneys who perceive these weaknesses in their clients will usually try to keep their clients off the witness stand because they know that "clients with language impairments can't testify." *Id.* at 27.

ii. Youth

"Regions of the brain, and brain functions, are not fully developed by age 18 (and often for

substantial years beyond that age),[6] inhibiting or affecting the capacity to engage in 'long term planning, regulation of emotion, impulse control, and the evaluation of risk and reward.'" Jules Epstein, *Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding 'Lack of Remorse' Testimony and Argument in Capital Proceedings,* 14 Temple Pol. & Civ. Rts. L. Rev. 45 (Fall, 2004). An immature defendant who takes the stand will often engage in behaviors, such as smiling or laughing inappropriately, due to nervousness rather than callousness. Jurors would show no sympathy for such inappropriate displays, regardless of the reason.

iii. Environmental influences

The ability of a defendant to testify effectively is often impacted by his incarceration. Prolonged incarceration requires a defendant to acquire survival skills which prevent any displays of emotion. This is especially true for a defendant who, at best, will receive a sentence of life without the possibility of parole.

---

6. A UCLA neuroscience study of brain maturation in adolescent and young adults show development continuing, on average, through age 25. Sowell et al., *In vivo evidence for post-maturation in frontal and striatal regions*, 2 Nature Neuroscience 10 (1999), available at

www.loni.ucla.edu/~esowell/nn1099_859.pdf.

> [P]risoners learn quickly to become hypervigilant and ever-alert for signs of threat or personal risk. Because the stakes are high, and because there are people in their immediate environment poised to take advantage of weakness or exploit carelessness or inattention, interpersonal distrust and suspicion often result. Some prisoners learn to project a tough convict veneer that keeps all others at a safe distance. Indeed, as one prison researcher put it, many prisoners 'believe that unless an inmate can convincingly project an image that conveys the potential for violence, he is likely to be dominated and exploited throughout the duration of his sentence.

Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-prison Adjustment,* University of California, Santa Cruz Prison to Home Conference, 2002, at 81, available at http://www.urban.org/UploadedPDF/410624_PyschologicalImpact.pdf.

iv. Uncooperative defendants

It is a mistake to assume that defendants enthusiastically participate in their attorneys' efforts to save their lives. Often, clients are not accurate historians of mitigation. They tend to minimize the

traumas suffered during their childhood development. Sometimes they refuse to acknowledge that they were the victims of abuse, either due to the embarrassment of being victimized, or because they do not want to air their families' "dirty laundry," or because they want to spare their families from the pain of participating in emotional testimony. Some defendants are so overwhelmed by grief or shame that they express to their attorneys a desire to admit the charges and accept the penalty of death.

These types of dynamics have been discussed in case law when it became relevant to ineffective assistance of counsel claims. In *Porter v. McCollum*, 558 U.S. 30 (2009), the defendant was described by his attorney as "fatalistic and uncooperative" because the defendant instructed his attorney not to speak with the defendant's ex-wife or son. *Porter v. McCollum*, 558 U.S. 30, 40 (2009).

> In *Deere I*, 41 Cal.3d 353, (1985). . . [D]efendant was adamant, in counsel's words, that '[h]e does not want any evidence presented on his behalf because in his heart that is his private life and to bring that evidence into court would violate his relationships with everybody he holds dear and respects in this world. And to him, those relationships are more important than anything else, including his life.' (*Deere II, supra*, 53 Cal.3d [705], 714.)

People v. Snow, 30 Cal.4th 43, 119 (2003).

v. Innocence

Innocent people are convicted of crimes they did not commit, including capital murder. The Innocence Project reports:

> Of more than 300 people exonerated through post-conviction DNA testing, more than 25% were convicted of murder. Eighteen were sentenced to die; others were charged with capital murder but narrowly escaped the death penalty, and still others would likely have been charged with capital crimes if the death penalty had been in place at the time of their trials.

The Death Penalty, Innocence Project, http://www.innocenceproject.org/Content/The_Death_Penalty.php (last visited Nov. 15, 2013). An innocent defendant who takes the witness stand during penalty and professes his innocence would risk offending/alienating the jury who rendered the verdict of guilt. Furthermore, an innocent defendant cannot express remorse for a crime he did not commit.

A penalty phase trial that allows jurors to make life and death decisions based upon ambiguous

and speculative evidence offends the principle that "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). A defendant's decision not to testify is based on decisions made in consultation with counsel that are irrelevant to a jury's consideration of aggravating and mitigating circumstances. Therefore jurors should receive a *Carter* instruction advising them that they are not to draw any adverse inferences from a defendant's silence.

CONCLUSION

The Sixth Circuit decision appropriately applied this Court's established precedent when it recognized that criminal defendants have a clearly established constitutional right to a requested "no adverse inference" instruction during the penalty phase of a capital trial where the defendant does not testify. Jurors are naturally inclined to draw adverse inferences from the defendant's silence. Without this limiting instruction, the defendant's election not to testify becomes weighted in favor of aggravation as jurors speculate and attribute the defendant's silence to negative character traits.

Silence is particularly susceptible to misinterpretation when it is taken out of context, and any attempt to draw adverse inferences from that silence would be based upon caprice and speculation. "It is of vital importance to the

defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). For the above stated reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted this 19th day of November, 2013.

RONALD L. BROWN
PUBLIC DEFENDER OF LOS ANGELES COUNTY, CALIFORNIA
ALBERT J. MENASTER,
(State Bar No. 57787)
Counsel of Record
ROBIN BERNSTEIN-LEV
(State Bar No. 130842)
Deputy Public Defenders
APPELLATE BRANCH
320 West Temple Street, Rm 590
Los Angeles, CA 90012
Telephone: (213) 974-3058
Fax No. (213) 626-3519

Counsel for *Amicus Curiae*

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV 19 2013
OFFICE OF THE CLERK

No. 12-794

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY WHITE, Warden,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

JUSTIN F. MARCEAU
Counsel of Record
University of Denver
Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80210
(303) 871-6449
jmarceau@law.du.edu

LEE KOVARSKY
University of Maryland
Francis King Carey
School of Law
500 W. Baltimore St.
Baltimore, MD 21201
(434) 466-8257

Counsel for Amicus Curiae
[Additional Counsel Listed On Inside Cover]

QUESTIONS PRESENTED

I. Whether the Sixth Circuit violated 28 U.S.C. § 2254(d)(1) by granting habeas relief on the trial court's failure to provide a no adverse inference instruction even though this Court has not "clearly established" that such an instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to the crimes and aggravating circumstances.

II. Whether the Sixth Circuit violated the harmless error standard in *Brecht* v. *Abrahamson,* 57 U.S. 619 (1993), in ruling that the absence of a no adverse inference instruction was not harmless in spite of a guilty plea to the crimes and aggravators.

This brief *amicus curiae* addresses Question 1.

BARBARA BERGMAN
Co-Chair, NACDL Amicus Committee
University of New Mexico School of Law
Albuquerque, NM 87131
(502) 277-4700

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE QUESTIONS PRESENTED DO NOT SUBSUME THE ISSUE OF WHETHER, UNDER § 2254(d)(1), THE STATE DECISION INVOLVED AN "UNREASONABLE APPLICATION" OF FEDERAL LAW 5

II. SECTION 2254(d)(1)'S "UNREASONABLE APPLICATION" CLAUSE REACHES APPLICATIONS OF CLEARLY ESTABLISHED FEDERAL LAW THAT ARE EITHER TOO BROAD OR TOO NARROW 7

III. WHEN A COURT ANALYZES A REASONED OPINION UNDER 28 U.S.C. § 2254(d)(1), IT ASKS WHETHER THE DECISION IS OBJECTIVELY UNREASONABLE...14

A. Federal Court Does Not Formulate Hypothetical Justifications for the State Court Outcome If The State Decision Provides a Written Account of Its Reasons 15

B. *Harrington's* "Fairminded Language Does Not Resuscitate The "No Reasonable Jurist" Standard Rejected in *Williams* 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Bledsoe v. *Bruce*, 569 F. 3d 1223 (10th Cir. 2009) 8

Brinson v. *Vaughn*, 398 F. 3d 225 (3d Cir. 2005) ... 8

Carey v. *Musladin*, 549 U.S. 70 (2006) 5

Chester v. *Thaler*, 666 F. 3d 340 (5th Cir. 2011) . . . 5

Cullen v. *Pinholster*, 131 S.Ct. 1388 (2011) 10

Day v. *McDonough*, 547 U.S. 198 (2006) 6

DeCastro v. *Branker*, 642 F. 3d 442 (4th Cir. 2011) 8

Early v. Packer, 537 U.S. 3 (2003) 18

Felker v. *Turpin*, 518 U.S. 651 (1996) 13

Franklin v. *Bradshaw*, 695 F. 3d 439 (6th Cir. 2012) 8

Fratta v. *Quarterman*, 536 F. 3d 485 (5th Cir. 2008) 8

Gautt v. *Lewis*, 489 F. 3d 993 (9th Cir. 2007) 8

Green v. *Nelson*, 595 F. 3d 1245 (11th Cir. 2010) 8

Harrington v. *Richter*, 131 S.Ct. 770 (2011) . . *passim*

Hohn v. *United States*, 524 U.S. 236 (1998) 13

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 6

Morgan v. *Hardy*, 662 F. 3d 790 (7th Cir. 2011) . . . 8

Moussa Gouleed v. *Wengler*, 589 F. 3d 976 (8th Cir. 2009) 8

Parker v. *Matthews*, 132 S. Ct. 2148 (2012) . . . 17

Porter v. *McCollum*, 558 U.S. 30 (2009) 16

Ramdass v. *Angelone*, 530 U.S. 156 (2000) 7, 9

Richard S. v. *Carpinello*, 589 F. 3d 75 (2d Cir. 2009) 8

Rompilla v. *Beard*, 545 U.S. 374 (2005) 16

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 18

Stewart v. *Martinez-Villareal*, 523 U.S. 637 (1998) 13

Strickland v. *Washington*, 466 U.S. 668 (1984) 9

Wetzel v. *Lambert*, 132 S.Ct. 1195 (2012) 17

Wiggins v. *Smith*, 539 U.S. 510 (2003) 17

Williams v. *Taylor*, 529 U.S. 362 (2000) . . . . . *passim*

Wright v. *Van Patten*, 552 U.S. 120 (2008) 5

Yarborough v. *Alvardo*, 541 U.S. 652 (2004) 9

Yeboah-Sefah v. *Ficco*, 556 F. 3d 53 (1st Cir. 2009) 8

STATUTES AND RULES

28 U.S.C. 2254(d) . . . . . *passim*

28 U.S.C. 2254(d)(1) . . . . . *passim*

OTHER AUTHORITIES

Lee Kovarsky, AEDPA's Wrecks: Comity, Finality, and Federalism, 82 TUL. L. REV. 443 (2007) 13

IN THE
SUPREME COURT OF THE UNITED STATES

No. 12-794

RANDY WHITE, Warden,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") regularly participates in litigation regarding the fair administration of capital punishment.[1] The *NACDL* has prepared this brief in order to specifically respond to some of the contentions contained in *amicus* briefs in support of the Petitioner, Warden Randy White.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief, and no person other than *amicus*, their members, or their counsel made such a contribution. All parties consented to the filing of this brief. Letters granting consent have been filed with the Clerk.

The NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, the NACDL's approximately 10,000 direct members in 28 countries – and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys – including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges are committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes the NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

The NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the proper construction of the habeas corpus statutes and common law. In furtherance of this and its other objectives, the NACDL files approximately 50 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

SUMMARY OF ARGUMENT

Under 28 § U.S.C. 2254(d)(1), a federal court may review a *claim* on the merits if the state *decision* "involves an unreasonable application of * * * clearly established Federal law, as determined by the Supreme Court of the United States[.]" Although the

Question Presented for certiorari review is limited to the meaning of the phrase "clearly established federal law," the Warden and aligned *Amici*[2] are asking that the Court venture beyond the issues fairly subsumed by the certiorari grant and effectively overrule the definitive interpretation of the "unreasonable-application" clause, *Williams* v. *Taylor*, 529 U.S. 362, 407-14 (2000). This Brief addresses two features of the inquiry with which the Warden and aligned Amici would replace *Williams*.

First, the Warden and aligned *Amici* want to slice the unreasonable-application clause in half. *Williams* interpreted the unreasonable-application clause symmetrically, holding that a state court might apply law unreasonably either because it applies a principle too broadly or because it applies a principle too narrowly. *See Williams*, 529 U.S. at 408. The briefs of the Warden and, in particular, the Criminal Legal Justice Foundation ("CJLF") urge this Court to interpret the unreasonable-application clause asymmetrically, such that it would not cover unreasonably narrow applications of legal principles. The Court should preserve the clause's symmetric operation, which reflects statutory text, logic, and precedent.

Second, even in situations where the unreasonable-application clause controls the inquiry, the Warden and aligned *Amicus* propose new ideas about how federal courts should perform it. In their view, a federal court should not ask whether the *actual*

---

[2] Three *amicus* briefs have been filed in support of the Warden: the Criminal Justice Legal Foundation ("CJLF"); the State of Texas; and the State of Arizona and Thirteen Other States.

reasoning in the state opinion is a reasonable application of law; it should instead ask whether *any hypothetical reasoning could be* a reasonable application of law. TX Br. at 4. The Warden and aligned *Amicus* also opine that a state decision applies law reasonably as long as a single "fair-minded" jurist might agree with that application. Pet. Br. at 43. Both features of this type of unreasonable-application inquiry represent substantial departures from *Williams* and from newer, more granular precedent.

ARGUMENT

Title 28 U.S.C. § 2254(d) limits the federal post-conviction relief available to state inmates. If a state decision is on the merits, then section 2254(d) permits substantive review of the claim only if the inmate can satisfy one of the two subsections. Subsection (1) is the provision at issue here, and it permits merits review if a state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" For many years, the leading case interpreting the unreasonable-application clause has been *Williams* v. *Taylor*, 529 U.S. 362 (2000) (announcing operation of unreasonable-application clause). *See id.* at 407-14.

The Warden and aligned *Amicus* seek to upend the established understanding of the statutory text, as interpreted in *Williams*. Specifically: (1) they argue that the unreasonable-application clause does not operate on state decisions that under-apply rather than over-apply a principle; and (2) they propound precedentially unsupported steps by which the operation should be performed.

I. THE QUESTIONS PRESENTED DO NOT SUBSUME THE ISSUE OF WHETHER, UNDER § 2254(d)(1), THE STATE DECISION INVOLVED AN "UNREASONABLE APPLICATION" OF FEDERAL LAW

Although the "unreasonable application" and "clearly established federal law" questions arise under the same statutory provision and both limit federal habeas relief, they are analytically distinct. *See Williams* v. *Taylor*, 529 U.S. 362, 413 (2000) (recognizing the need to first "identif[y] the correct governing principle" and *then* to assess whether it was "unreasonably applie[d] * * * to the facts of the prisoner's case.") (emphasis added).[3] Circuit courts are in agreement that these two questions are analytically distinct steps and ought to be addressed separately. *See, e.g., Chester v. Thaler*, 666 F.3d 340, 345 (5th 2011) ("The first step * * * is to identify the Supreme Court holding that the state court supposedly unreasonably applied."). Through the Questions Presented, Kentucky has asked this Court to find that there is no clearly established federal law; they have not asked for a disposition on the unreasonable-application clause.[4] Accordingly, the unreasonable-

---

[3] Consistent with *Williams*' bifurcation of the issues, one line of doctrine has developed addressing what is clearly established law, *see, e.g., Wright* v. *Van Patten*, 552 U.S. 120 (2008); *Carey* v. *Musladin*, 549 U.S. 70 (2006), and a separate, conceptually distinct line of cases has emerged addressing the proper meaning of the unreasonable-application clause, *see, e.g., Harrington* v. *Richter*, 131 S.Ct. 770 (2011).

[4] The pertinent Question Presented reads: "Whether the Sixth Circuit, violated 28 U.S.C. § 2254(d)(1), by granting habeas relief * * * even though this Court has not 'clearly established'

application issues addressed by the Warden and aligned *Amici* should be treated as outside the scope of the Questions Presented and this Court's review should be limited to the question of "clearly established federal law" for which *certiorari* was granted. It should avoid a far-reaching decision on the "unreasonable-application" clause.[5] *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). The fact that the "unreasonable-application" clause appears in the same statutory provision as the clearly established law requirement does not mean that it is fairly subsumed by the Question Presented; its resolution would have to be logically necessary to resolve the clearly-established-federal-law issue. *Cf. Day* v. *McDonough*, 547 U.S. 198, 203 n.2 (2006) (refusing to consider the underlying timeliness of a habeas petition when presented with the question of whether the district court properly gave effect to the state's waiver of the timeliness defense); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.* 510 U.S. 27, 31-32 (1993) ("A question which is merely complementary or related to the question presented in the petition for certiorari is not fairly included therein.") (internal citations omitted).

---

that such an instruction is required * * * ." The Warden simply failed to ask the Court to review the Sixth Circuit interpretation of the unreasonable-application clause. The question of unreasonableness is not subsumed by the question of clearly established law.

[5] The CJLF spends several pages of its brief advocating for a new reading of the "contrary to" clause. CJLF Br. at 7-10. This clause of the statute is also not at issue, was not litigated below, and is not subsumed by the Questions Presented.

Accordingly, the Court should not reconsider the issues of interpretation regarding the "unreasonable application" clause addressed in *Williams*. However, in the event the Court does consider these questions, the remainder of this brief explains why the readings of § 2254(d)(1) offered by the *Amici* aligned with the warden are incorrect.

II. SECTION 2254(d)(1)'S "UNREASONABLE APPLICATION" CLAUSE REACHES APPLICATIONS OF CLEARLY ESTABLISHED FEDERAL LAW THAT ARE EITHER TOO BROAD OR TOO NARROW

Williams repeatedly underscores that a state decision could involve an unreasonable application of law because it applied a principle too broadly or too narrowly. *See* 529 U.S. at 407-08. This Court did note reservations about a strict dichotomy between law and fact questions, but it did not—as the CJLF brief suggests—express *any* uncertainty about the fact that the unreasonable-application clause operated symmetrically. *See ibid.*; CJLF Br. at 10-15. Since *Williams*, it has been accepted doctrine that a state court adjudication could be unreasonable if it applied a legal principle too broadly or too narrowly. *See, e.g.*, *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) (plurality opinion) (reiterating that a state court can act unreasonably "in refusing to extend the governing legal principle to a context in which the principle should have controlled.").

The Warden and aligned *Amici*, in particular the CJLF, argue for an abandonment of *Williams*'

central framework. CJLF Br. at 10-15. In a striking disregard for the accepted wisdom of every circuit court,[6] they argue that the *Williams* rule should be abridged such that only unreasonably broad but not unreasonably narrow constructions of federal law will justify federal habeas relief. CJLF Br, at 4 (declaring that the "unreasonably refuses to extend" half of the *Williams* decision should be "expressly disapproved").

This Court should not use this case as a vehicle to halve the coverage of the unreasonable-application clause. Even assuming *arguendo* that the interpretive issue is fairly presented, the test set forth in *Williams v. Taylor*—which provides that the clause reaches both unreasonably narrow and unreasonably broad applications—remains the appropriate standard.[7] The symmetric interpretation in *Williams* has served as the baseline for every federal court interpreting § 2254(d)(1) for more than a decade. There are at least three reasons that this Court should reject the narrow

---

[6] With varying degrees of exactitude, every federal court of appeals has embraced the notion that a principle is unreasonably applied when a state court unreasonably fails to extend the principle. *See, e.g.*, *Yeboah-Sefah* v. *Ficco*, 556 F. 3d 53,70-71 (1st Cir. 2009); *Richard S.* v. *Carpinello*, 589 F. 3d 75, 80 (2d Cir. 2009); *Brinson* v. *Vaughn*, 398 F. 3d 225 (3d Cir. 2005); *DeCastro* v. *Branker*, 642 F. 3d 442, 449 (4th Cir. 2011); *Fratta* v. *Quarterman*, 536 F. 3d 485, 502 (5th Cir. 2008); *Franklin* v. *Bradshaw*, 695 F. 3d 439, 446 (6th Cir. 2012); *Morgan* v. *Hardy*, 662 F. 3d 790, 797 (7th Cir. 2011); *Moussa Gouleed* v. *Wengler*, 589 F. 3d 976, 980 (8th Cir. 2009); *Gautt* v. *Lewis*, 489 F.3d 993, 1002 (9th Cir. 2007); *Bledsoe* v. *Bruce*, 569 F. 3d 1223, 1231 (10th Cir. 2009); *Green* v. *Nelson*, 595 F. 3d 1245, 1248 (11th Cir. 2010).

[7] NACDL assumes for the sake of this argument that there is clearly established federal law. As to this point, NACDL fully endorses Respondent's articulation of the relevant clearly established law.

reading of the unreasonable-application clause.

First, the Court should reject an asymmetric interpretation that distinguishes between decisions applying principles too broadly and decisions applying principles too narrowly—because the distinction is conceptually meaningless.[8] Every legal principle is capable of being described in both ways. Every body of precedent has animating principles and limiting principles, and so every decision can be described *both* as an unreasonable application of the animating principle in one direction and an unreasonable application of the limiting principle in the other. For that reason, *Williams* and its progeny treat the distinction as immaterial. In this case, for example, one could fairly characterize the question as one of the state court's unreasonable failure to extend the underlying Fifth Amendment right, or its unreasonable application of a limiting principle from the relevant cases.

Stated differently, it is accepted wisdom that the "difference between applying a rule and extending it is not always clear." *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004). The creation of any per se rules in this context, then, threatens greater rather than less

---

[8] Inherent in this framework is a degree of symmetry that is well suited for the reasonableness inquiry commanded by the statutory text. In this way, a narrow conception of the settled principles of, for example, *Strickland v. Washington*, 446 U.S. 668 (1984), so as to deny its application in a new context is unreasonable. And likewise, an overly broad conception of what is required in order to demonstrate prejudice under *Strickland* is unreasonable. *Cf. Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) (plurality opinion) (reiterating the refusal to extend standard).

uncertainty in habeas doctrine.[9] Indeed, the very per se rule advocated by the CJLF brief was considered and rejected by this Court in *Yarborough* because the Court recognized that such an approach is impractical for the lawyers and judges working on these cases in lower courts. *Id.* at 666 (recognizing that because the difference between applying and expanding a rule is often elusive, it was necessary to reject the view that any extension of a principle was impermissible).

Second and closely related, the asymmetric interpretation of the unreasonable-application clause will constantly plunge federal courts into meaningless litigation over whether a principle should be characterized as an unreasonably narrow application of an animating principle or an unreasonably broad application of a limiting principle. CJLF's own brief reveals how cumbersome the asymmetric interpretation would be. CJLF proposes that lower

---

[9] Amicus CJLF laments the "increased delay" under the AEDPA regime. CJLF Br. At 5. But for any organization whose members actually litigate these cases, as is the case with the NACDL, it is obvious that much of the complained of delay results from frequent rulings that require the parsing of needlessly subtle distinctions. When new cases emerge in this field, even those designed to limit habeas relief, such as *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), considerable and time consuming litigation ensues. Any change in the seminal *Williams v. Taylor* framework will result in the very delays that CJLF seeks to avoid insofar as lower courts will be forced to reset and relearn federal habeas yet again.

courts first distinguish between broad and narrow rules, and then distinguish between rule applications and rule extensions. CJLF Br. at 14. Under this conceptual framework, broad rules can be applied unreasonably, at least sometimes, when they are not extended, but narrow rules require a distinct analysis: to wit, was it applied. *Id.* Such a system is patently unworkable, and federal habeas will not be made more efficient by asking lower courts to apply this four-part classification in each case.

To put the matter as plainly as possible, the Warden and aligned Amici erroneously argue that the core defect with modern habeas is the passage in *Williams* suggesting that relief must be available when a state "unreasonably refuses to extend" a legal principle to a new context. *See, e.g.*, CJLF Br. at 4. In reality, however, any application of law to facts could be characterized as under-extending one principle, or over-extending a separate counter-vailing principle. Tasking lower courts with sorting out this semantic distinction between extending one principle and refusing to extend a different principle would be a mistake.

Third, as a matter of statutory construction, such a distinction is unfounded. Section 2254(d)'s plain text encompasses all "unreasonable applications" of federal law by the state court, whether overly narrow or overly broad. Constructing "unreasonable application" so as to bar only unreasonably broad applications of federal law threatens to "sap * * * the unreasonable application clause of any meaning."

Williams, 529 U.S. at 407. If unreasonably broad state court adjudications typically inure to the benefit of defendants, then it is unlikely that such claims will be raised on federal habeas. Alternatively, if unreasonably broad state court adjudications include things like overly broad conceptions of what is required for prejudice under *Strickland*, then it is likely that most such claims will be classified as instances where the state court decision was "contrary to" federal law, rather than an "unreasonable application" of it. Either way, if only unreasonably broad (and not narrow) applications of federal principles qualify for relief, then the two clauses – "unreasonable application" and "contrary to" – no longer enjoy the sort of independent meaning this Court has required. *Williams*, 529 U.S. at 407 (noting the importance of reading the statute so as to "give meaning to every clause of the statute").

The CJLF tries to create space to reinterpret *Williams* by suggesting that this Court equivocated in its symmetric reading of the unreasonable-application clause. The excerpted passage expresses some uncertainty, but it has nothing to do with symmetry. *See Williams*, 529 U.S. at 408; CJLF Br. at 10-11. Even a cursory read of the passage reveals that it is nothing more than a concession that, just as it is difficult to distinguish "a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of legal principle (or an unreasonable failure to apply a legal principle) to a new context." *Williams*, 529 U.S. at 408. Even

though the Court was plainly uncomfortable committing to a clear rule for distinguishing legal-application questions from pure-law questions, the excerpted text does not evince a preference for the rule of asymmetric operation proposed by CJLF. That line drawing question is difficult whether the Court confronts the application of a legal principle that is too broad or too narrow.

Finally, the Warden and aligned Amicus resort to the familiar argument that the State should win all contested interpretive questions because AEDPA's "purpose" is to restrict relief. Just as principles have both animating and limiting purposes, so too do statutes. AEDPA's text reflects multiple purposes, and the intedeterminacy-goes-to-the-state rule is utterly useless in sorting out meaning in cases where those purposes are in tension. AEDPA, in particular, represents the legislative output of many brokered compromises. Lee Kovarsky, AEDPA's Wrecks: Comity, Finality, and Federalism, 82 TUL. L. REV. 443, 459 (2007) (summarizing the compromises in the legislative history and discussing the folly of relying on interpretation based on "legislative mood"). To extract a single purpose from that multi-dimensional compromise is farce.[10] Of course, Congress intended section 2254(d) to be restrictive, but that proposition is

---

[10] It is also thoroughly inconsistent with this Court's precedent. In addition to *Williams* itself, this Court has frequently rejected broad interpretations of the AEDPA advanced by the state and grounded in little more than an abstract desire to "limit" relief. *See, e.g., Hohn* v. *United States*, 524 U.S. 236 (1998), *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), and *Felker* v. *Turpin*, 518 U.S. 651 (1996).

not helpful when the question for the Court is "how restrictive?" The Court should continue to act with the same judiciousness that it has demonstrated so far and decide the meaning of the unreasonable-application clause through established practices—by resort to text and precedent—and not by reference to an interpretive presumption against habeas relief on all contested questions.

In short, there is nothing in doctrine, text, or commonsense that supports the proposed artificial distinction between unreasonably narrow applications of federal principles and unreasonably broad applications of federal principles. But the cost in terms of increased confusion and delay that will be generated by such a shift in doctrine cannot be gainsaid.

III. WHEN A COURT ANALYZES A REASONED OPINION UNDER 28 U.S.C. § 2254(d)(1), IT ASKS WHETHER THE DECISION IS OBJECTIVELY UNREASONABLE

This Court has held that a reasoned state decision involves an "unreasonable application" of clearly established federal law if that application is objectively unreasonable. *See Williams*, 529 U.S. at 409-10. *Williams* expressly rejected the proposition that a state decision could be unreasonable only if "all reasonable jurists" disagreed with it. *See ibid.* The Warden and aligned *Amici* rely heavily on *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), for two propositions: (1) that a state decision involves a reasonable application if *any potential basis justifying the result*

is reasonable, TX Br. (passim); and that (2) in practice, the unreasonable-application clause should work as an all-reasonable-jurist standard rejected by *Williams*. Pet. Br. at 44.

A. A Federal Court Does Not Formulate Hypothetical Justifications for the State Court Outcome if the State Decision Provides a Written Account of Its Reasons.

Richter involved a one-sentence state summary order that failed to disclose the basis of decision. 131 S. Ct. at 783. The *Richter* question was whether the summary order was a merits decision subject to the limits of § 2254(d) and, if so, how the unreasonable-application inquiry should proceed when the decision is accompanied by an unreasoned opinion. *Id.* at 783-85 (holding that a state summary order does trigger the limits in section 2254(d)); *id.* at 785-87 (explaining how the unreasonable-application clause operates in those cases). In cases where the state basis of decision is not disclosed because the state opinion is unreasoned, a federal court must evaluate whether any *potential* basis of decision was reasonable. *Id.* at 786.

The Warden and aligned *Amici* are quietly asking for an enormous expansion of that rule, to situations where the state court has *actually explained* the reasons for its judgment denying relief. The State of Texas urges, even for reasoned opinions, that a federal court ought to determine what hypothetical arguments "could have supported" the ultimate state result, and

deny relief if any of those hypothetical arguments are reasonable. TX Br. at 5-6.

The statute directs federal courts to determine whether the state decision "involves" an unreasonable application of law, and that verb selection demonstrates that Congress did not intend the interpretation that the Warden and aligned *Amici* request. The notion that federal courts must always hypothesize about potentially supportive reasoning not only conflicts with statutory text, but also with the cases. *Williams*, for example, is wildly incompatible with a could-have-supported rule. If section 2254(d)(1) requires a court to exhaust all hypothetical support even for a reasoned state opinion, then *Williams* itself would be insufficient to support the order granting relief in that case. If Texas's interpretation of the unreasonable-application clause were correct, then in order to reach the conclusion that Virginia had unreasonably applied ineffective-assistance-of-counsel principles, *Williams* would have had to discuss *all hypothetical* reasoning that might have supported the state judgment. In fact, if Texas is correct, then every other section 2254(d)(1) case that fails to analyze the multiplicity of potential, unexplicated support for an outcome has been decided incorrectly.

Of course, every opinion applying § 2254(d)(1) is not wrong rather Texas is wrong—when a state decision takes the form of a reasoned opinion, a federal court looks at legal analysis that a reasoned state decision actually involves. *Porter v. McCollum*, 558 U.S. 30, 39 (2009); *Rompilla v. Beard*, 545 U.S. 374,

390-93 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) In the face of a state court decision that articulates the basis for denying relief, it is the explicated rationales for denying relief that "would be relevant" to the application of Section 2254(d). *Parker v. Matthews*, 132 S.Ct. 2148, 2151-52 (2012). When a state court provides one or more grounds for denying relief, the federal court could not reach the claim unless both rationales were unreasonable. A federal court is not foreclosed from reviewing the merits of an unreasonably decided claim simply because the court could hypothesize some reasonable but-fictitious rationale in support of the outcome. *Id.*; *see also Wetzel v. Lambert*, 132 S.Ct. 1195, 1198-1199 (2012)(emphasizing the reach of Section 2254(d) across alternative, stated rationales for denying habeas relief).

The Texas brief selectively quotes the *Richter* passage, which, properly contextualized, does not undermine the unbroken string of authority looking to legal analysis state courts *actually use* in reasoned state decisions. The Texas brief's selective *Richter* excerpt provides that the federal court should have "determine[d] what arguments or theories supported or * * * could have supported[] the state court's decision[.]" *See* TX Br. at 5 (quoting *Richter*) (all alterations in original except closing period). The ellipses, however, change the meaning of the excerpted text. The original text reads: "Under § 2254(d), a habeas court must determine what arguments or theories supported or, *as here*, could have supported, the state court's decision." *Richter*,

131 S. Ct. at 786 (emphasis added). "As here" is the language that limits the holding to cases where the state decision is without explanatory reasoning.

The limited application of *Richter's* "could have supported" language makes sense. Under *Richter*, a federal court does not speculate about theoretically supportive reasoning because it must go beyond the *actual basis* for the state decision; it speculates about theoretically supportive reasoning because, in summary-denial cases, it does not know what the actual basis for decision is.

Insofar as it applies to silent, summary state court decisions, *Richter* is consonant with the comity principles underlying AEDPA. In a system of co-equal sovereigns, it makes sense to presume the best intentions and proper reasoning of state court judges when there is no direct evidence to the contrary. *See Richter*, 131 S. Ct. at 784 (calling for deference to decisions "unaccompanied by an explanation"). But when the state court decision "involved" an objectively and explicitly unreasonable application of federal law, then comity is not served by deference to a hypothetical – indeed fictitious – rationale. *Cf. Early v. Packer*, 537 U.S. 3, 8 (2003) ("Avoiding these pitfalls does not require citation of our cases-indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (recognizing that agency actions can be upheld only

on the basis of a rationale articulated by the agency, not on the basis of "post hoc rationalizations").

To approve deference to a hypothetical *post-hoc* rationale that the state court did not rely on is to turn comity on its head. *Cf. Richter,* 131 S.Ct. at 784 (concluding that there is "no merit" to defining the scope of AEDPA's application based on speculation about the potential impact of a rule on state court "[o]pinion writing practices."). The federal habeas court in these circumstances is not respecting the actions of a separate, state sovereign; instead, it is respecting a fiction generated by the federal court itself.

B. *Harrington's "Fairminded* Disagreement" Language Does Not Resuscitate The "No Reasonable Jurist" Standard Rejected in *Williams.*

This Court has repeatedly emphasized that Section 2254(d) "is difficult to meet * * * because it was meant to be," *Richter*, 131 S. Ct. at 786, and that a federal court may not declare an application to be unreasonable merely because the court believes it incorrect, *id.* at 785 (quoting *Williams*, 529 U.S. at 410). It has also held, however, that a claimant need not show that "all reasonable jurists" would disagree with an application of law to render it unreasonable. *See Williams*, 529 U.S. at 409-10. In *Williams*, the Court rejected the all-reasonable-jurists standard because, the Court explained, state respondents should not be able to defeat relief simply by pointing to a

dissent on the merits or to a single piece of authority inconsistent with the petitioner's position. See *id.* at 410 (holding that a state decision might be unreasonable even if judges dissented on the "underlying mixed constitutional question); *ibid.* (rejecting test for reasonableness based on the existence of conflicting authority). The Warden and aligned *Amici* urge that rejected position here. *See* TX Br. at 3, 8-9 (suggesting that state decision cannot be unreasonable if any question on the underlying constitutional issue exists); *id.* at 8 (focusing on Judge Cook's dissent as proof that the underlying state decision was reasonable).

Richter repeatedly explained that an application of law was not unreasonable if it could be the subject of "fair-minded" disagreement. *See Richter,* 131 S. Ct. at 786-87. The Warden reasons that "[f]airminded jurists could readily disagree" over application of the principle, Pet. Br. at 43, and the Texas Brief likewise cites the disagreement of fair-minded jurists as the touchstone of objective unreasonableness. Whatever "fair-minded disagreement" means, it cannot mean a return of the "all-reasonable-jurists" scenario unless this Court meant to overrule, *sub silencio*, the statutory interpretation in *Williams*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JUSTIN F. MARCEAU
Counsel of Record
University of Denver
Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80210
(303) 871-6449
jmarceau@law.du.edu

LEE KOVARSKY
University of Maryland
Francis King Carey
School of Law
500 W. Baltimore St.
Baltimore, MD 21201
(434) 466-8257
lkovarsky@
law.umaryland.edu

BARBARA BERGMAN
Co-Chair, NACDL
Amicus Committee
University of New Mexico
School of Law
1117 Stanford, N.E.
Albuquerque, NM 87131
(502) 277-3304
BERGMAN@law.unm.edu

Dated: November 19, 2013

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 18 2013
OFFICE OF THE CLERK

No. 12-794

In the Supreme Court of the United States

RANDY WHITE, WARDEN, PETITIONER

v.

ROBERT KEITH WOODALL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR TEXAS AS AMICUS CURIAE SUPPORTING PETITIONER

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

JAMES P. SULLIVAN
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Sullivan@
texasattorneygeneral.gov
(512) 936-1700

TABLE OF CONTENTS

Page

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 3

Section 2254(d) precludes federal habeas relief because the state court could have reasonably rejected respondent's *Carter* claim on harmless-error grounds 3

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) ..... *passim*

Burns v. *Secretary*, 720 F.3d 1296 (11th Cir. 2013) 8

Carter v. *Kentucky*, 450 U.S. 288 (1981) ..... *passim*

Chapman v. *California*, 386 U.S. 18 (1967) ..... *passim*

Fry v. *Pliler*, 551 U.S. 112 (2007) 9, 10

Gongora v. *Thaler*, 2013 WL 4080710 (5th Cir. Aug. 13, 2013) 1, 10

Griffin v. *California*, 380 U.S. 609 (1965) 2

Harrington v. *Richter*, 131 S. Ct. 770 (2011) ..... *passim*

Johnson v. *Acevedo*, 572 F.3d 398 (7th Cir. 2009) 10

Kokkonen v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994) 10

Kotteakos v. *United States*,
328 U.S. 750 (1946) 5

Metrish v. *Lancaster*, 133 S. Ct. 1781 (2013) ... 3

Mitchell v. *Esparza*,
540 U.S. 12 (2003) ..... *passim*

O'Neal v. *McAninch*,
513 U.S. 432 (1995) ..... *passim*

Parker v. *Matthews*, 132 S. Ct. 2148 (2012) 3

Price v. *Thurmer*,
637 F.3d 831 (7th Cir. 2011) 10

Ruelas v. *Wolfenbarger*,
580 F.3d 403 (6th Cir. 2009) 10

Schriro v. *Landrigan*, 550 U.S. 465 (2007) 9

United States v. *Askew*,
529 F.3d 1119 (D.C. Cir. 2008) 10

Michael Williams v. *Taylor*,
529 U.S. 420 (2000) 2

Woodford v. *Garceau*, 538 U.S. 202 (2003) 2

Constitution and Statutes:

U.S. Const. amend. V 1, 2

U.S. Const. amend. XIV 2

28 U.S.C. 2254(d) ..... *passim*

Miscellaneous:

Appl. to Recall & Stay Mandate Pending
Cert., *Stephens* v. *Gongora*, No. 13A243
(U.S. Aug. 31, 2013) 1

Recent Case, *Sixth Circuit Interprets
"Clearly Established Federal Law"
Narrowly:* Bunch v. Smith,
126 Harv. L. Rev. 860 (2013) 3

In the Supreme Court of the United States

No. 12-794

RANDY WHITE, WARDEN, PETITIONER

v.

ROBERT KEITH WOODALL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR TEXAS AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

A state prisoner has secured federal habeas relief on Fifth Amendment grounds despite his failure to overcome the relitigation bar of 28 U.S.C. 2254(d) and the harmless-error doctrine. This latest act of Sixth Circuit lawlessness is of particular interest to the State of Texas because, as a forthcoming certiorari petition will explain, the Fifth Circuit recently committed a similar error. See Appl. to Recall & Stay Mandate Pending Cert. 13-14, *Stephens* v. *Gongora*, No. 13A243 (U.S. Aug. 31, 2013) (arguing that this Court could hold certiorari petition and then GVR in light of this case); *Gongora* v. *Thaler*, 2013 WL 4080710, at *8 (5th Cir. Aug. 13, 2013) (Smith, J., dissenting from denial of rehearing en banc) (noting this "similar case in which the Supreme Court recently granted certiorari"). Moreover, as a direct beneficiary of Section 2254(d),

Texas has a general interest in advancing "the principles of comity, finality, and federalism" that motivated Congress to enact that key provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (quoting *Michael Williams* v. *Taylor*, 529 U.S. 420, 436 (2000)). Accordingly, Texas submits this amicus brief in support of petitioner.

SUMMARY OF ARGUMENT

The Sixth Circuit's grant of federal habeas relief violates Section 2254(d), as construed in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), and *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (per curiam). *Harrington* held that if a federal habeas court can imagine any reasonable basis for a state court's decision to reject a claim on the merits, then the relitigation bar of Section 2254(d) forecloses relief. And *Mitchell* held that if a state court is not unreasonable in rejecting a claim under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), then federal habeas relief is likewise precluded by Section 2254(d).

Taken together, these holdings make this a straightforward case. The Kentucky Supreme Court could have rejected respondent's *Carter* claim[1] on the reasonable ground that the error was harmless

---

[1] See *Carter* v. *Kentucky*, 450 U.S. 288, 305 (1981) (holding that the Fifth Amendment, as interpreted by *Griffin* v. *California*, 380 U.S. 609 (1965), and incorporated by the Fourteenth Amendment, gives a criminal defendant in state court the right, upon request, to a jury instruction that his decision not to testify cannot be used to make an adverse inference of guilt).

beyond a reasonable doubt under *Chapman*. As the Sixth Circuit dissent argued, albeit under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), the trial court's refusal to give a no-adverse-inference instruction at the penalty phase was harmless in light of the overwhelming evidence of respondent's horrific crimes and lack of remorse, his plea of guilt as to the crimes and aggravating circumstances, and the prosecutors' silence about his silence.

The Sixth Circuit did not explain why such a harmless-error disposition by the Kentucky Supreme Court would have been not only wrong but unreasonable. Nor could the Sixth Circuit provide a satisfactory explanation, given its shilly-shally reliance upon the "grave doubt" rule of *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). When a federal court is that uncertain about harmlessness, it is hardly in a position to condemn a state court's harmless-error decision as "so lacking in justification that there [would be] an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786-787.

ARGUMENT

SECTION 2254(d) PRECLUDES FEDERAL HABEAS RELIEF BECAUSE THE STATE COURT COULD HAVE REASONABLY REJECTED RESPONDENT'S *CARTER* CLAIM ON HARMLESS-ERROR GROUNDS

Recent history suggests that the Court granted here with a view to reverse the Sixth Circuit in yet another habeas case. See, *e.g.*, *Metrish* v. *Lancaster*, 133 S. Ct. 1781 (2013); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (per curiam); Recent Case, *Sixth Circuit Interprets "Clearly Established Federal Law"*

Narrowly: Bunch v. Smith, 126 Harv. L. Rev. 860, 866-867 (2013). Texas respectfully submits that there is more than one way to skin this cat. The certiorari petition presented a pair of questions—one on Section 2254(d) and one on the harmless-error doctrine. By combining those two concepts, the Court can reverse the Sixth Circuit without having to explore the limits of *Carter* v. *Kentucky*, 450 U.S. 288 (1981), or determine whether "grave doubt" truly exists within the meaning of *O'Neal* v. *McAninch*, 513 U.S. 432 (1995).

A. Respondent raised a penalty-phase *Carter* claim on direct appeal in the Kentucky Supreme Court, where it was rejected on the merits. Pet. App. 261a-263a. He later urged the same claim in his federal habeas application and got a warmer reception from the Western District of Kentucky. See *id.* at 44a-64a; but see *id.* at 176a-184a.

A divided panel of the Sixth Circuit affirmed the district court's grant of federal habeas relief. Pet. App. 12a. According to Judge Martin's majority opinion, AEDPA's relitigation bar did not foreclose relief on the *Carter* claim because respondent satisfied the "unreasonable application" exception of Section 2254(d)(1). *Id.* at 5a-9a (holding that the Kentucky Supreme Court unreasonably refused to extend *Carter*'s holding to the penalty phase of a capital trial in which the defendant pleaded guilty to the crimes and aggravating circumstances).

The Sixth Circuit went on to hold that the *Carter* error was not harmless under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), because the judges in the majority harbored "grave doubt" under *O'Neal*. Pet. App. 9a-12a. Wrote Judge Martin:

> Because we cannot know what led the jury to make the decision that it did, and because the jury may well have based its decision on [respondent's] failure to testify, we cannot conclude that this is a case of "harmless error." * * * Given our grave doubt that the jury's recommendation was not influenced by adverse inferences drawn from [respondent's] decision not to testify, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."

Id. at 11a (quoting *O'Neal*, 513 U.S. at 437 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946))); accord *id.* at 63a (conveying district court's equally indecisive conclusion).

In her dissent, Judge Cook pointed to the "mountain of undisputed evidence that [respondent] abducted, raped, maimed, and drowned a sixteen-year-old high school student," and concluded that the majority's "[p]ure conjecture does not establish grave doubt." Pet. App. 13a, 24a-29a.

B. The Sixth Circuit's grant of federal habeas relief contravenes Section 2254(d). In deciding whether respondent can get the benefit of Section 2254(d)(1)'s "unreasonable application" exception to the relitigation bar, the Sixth Circuit should have "determine[d] what arguments or theories supported or * * * could have supported[] the state court's decision"—taking care not to "overlook[] arguments that would otherwise justify the state court's result"—and then "ask[ed] whether it is possible

fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington* v. *Richter*, 131 S. Ct. 770, 784, 786 (2011); see also *id.* at 786 ("If this standard is difficult to meet, that is because it was meant to be."). *Harrington* thus establishes that a prisoner's entitlement to federal habeas relief does not depend on the quality of the state court's reasoning process, but on the quality of his underlying claim. A prisoner who invokes the "unreasonable application" exception bears the burden of "showing there was no reasonable basis for the state court to deny relief"—he must contend with what the state court *could have* said against his claim, rather than what it *did* say. *Id.* at 784.

Mitchell v. *Esparza*, 540 U.S. 12 (2003) (per curiam), identified the harmless-error doctrine as one of the potentially reasonable bases for a state court to reject a prisoner's claim on the merits. The Court there held that Section 2254(d) precluded federal habeas relief as to a claim because the state court had not been unreasonable in rejecting it under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). See *Mitchell*, 540 U.S. at 17-19. The Court explained its summary reversal of the Sixth Circuit as follows: "We may not grant [a] habeas petition * * * if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Id.* at 18.

Harrington and *Mitchell* combine to make short work of this case because the Kentucky Supreme

Court could have reasonably rejected respondent's *Carter* claim as harmless error.

The jury that condemned respondent to die learned how he had kidnapped a sixteen-year-old named Sarah Hansen, slashed her throat with a box cutter, disrobed and raped her, and then drowned her in a lake. Pet. App. 259a-260a. Faced with overwhelming evidence of his "revolting and despicable" crimes, *id.* at 30a, respondent pleaded guilty to murder, rape, and kidnapping, and to all of the aggravating circumstances. *Id.* at 27a-28a, 128a, 260a-261a. The jury was apprised of this guilty plea and of a prior sexual-abuse conviction. Pet'r Br. 4, 6 (citing state court record). "On the issue of remorse, the jury heard independent testimony from [respondent's] mother that, shortly after the murder, [he] came to her house, sat in a recliner, and watched television as if nothing had happened." Pet. App. 27a. Respondent did not testify, but his witnesses presented a mitigation case revealing, among other things, that he had an IQ in the 70s and a spastic colon that his mother and grandmother treated with suppositories made of soap. Pet'r Br. 7-8. Family members also testified that respondent had sexually abused several cousins. *Id.* at 8-9. The prosecutors remained silent about respondent's silence, never drawing the jury's attention to his failure to take the stand. Pet. App. 28a; see also *id.* at 45a (noting that prosecutors did not object to respondent's request for a no-adverse-inference instruction at penalty phase).

In her dissent from the Sixth Circuit's decision, Judge Cook surveyed the record and argued that any *Carter* error in this case was harmless under *Brecht* and *O'Neal*. Pet. App. 27a-28a.[2] The Kentucky Supreme Court could have similarly concluded, based on the predominance of aggravation over mitigation and the fact that prosecutors never mentioned respondent's failure to testify, that the trial court's failure to deliver a no-adverse-inference instruction to the jury was "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. Such a conclusion would be reasonable, if not correct, so Section 2254(d) precludes federal habeas relief.

The Sixth Circuit did not even attempt to explain why this harmless-error approach by the state court is "so lacking in justification that there [would be] an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786-787. And any effort to do so would have failed because the Sixth Circuit based its own harmless-error conclusion on *O'Neal*'s "grave doubt" rule. Pet. App. 5a, 9a-12a; see also Br. in Opp. 21 (conceding respondent's agreement with Sixth Circuit's *O'Neal* conclusion). This means that the federal judges who granted habeas relief were "uncertain" and "in virtual equipoise as to the harmlessness of the error" under *Brecht*, because they deemed "the record [to

---

[2] See also *Burns* v. *Secretary*, 720 F.3d 1296, 1305-1307 (11th Cir. 2013) (holding penalty-phase *Carter* error harmless under *Brecht* because "the mitigators here were weak and the aggravators were strong," and because "the state never once commented on [defendant's] failure to testify").

be] so evenly balanced" that they could say no more than that respondent was "*quite possibly* being held in custody in violation of the Constitution." *O'Neal*, 513 U.S. at 435, 437, 442 (internal quotation marks omitted); see also *id.* at 442 ("We also are assuming that the judge's conscientious answer to the question, 'But, did that error have a "substantial and injurious effect or influence" on the jury's decision?' is, 'It is extremely difficult to say.' ").

If the Sixth Circuit could not bring itself to say unequivocally that respondent's *Carter* error was harmless under *Brecht*, how could it plausibly declare that the Supreme Court of Kentucky would be not only wrong but unreasonable to hold that error harmless under *Chapman*? "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro* v. *Landrigan*, 550 U.S. 465, 473 (2007). The Sixth Circuit's manifest uncertainty would have kept it from reaching that threshold, had it bothered to try.

C. In *Fry* v. *Pliler*, 551 U.S. 112, 120 (2007), the Court suggested that it "makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." The quoted sentence does not threaten the Section 2254(d) argument put forth in this brief.

The *Fry* Court carefully tempered its observation about the harmless-error hierarchy by inserting the word "when." This case reveals the wisdom of that analytical hedge. It makes perfect sense to require formal application of both tests when the *Brecht* test does not subsume the AEDPA/*Chapman* test, as will

be true for cases in which the *Brecht* test cannot be answered without resort to *O'Neal*'s "grave doubt" rule. With *Harrington* having tightened up Section 2254(d), moreover, it is less likely now than when *Fry* was decided that the *Brecht* test will subsume the AEDPA/*Chapman* test. Cf. *Price* v. *Thurmer*, 637 F.3d 831, 839 (7th Cir. 2011) (Posner, J.) (noting *Harrington*'s "rather unexpected vigor").

In any event, the quoted dictum from *Fry* did not overrule the holding of *Mitchell*. See *Johnson* v. *Acevedo*, 572 F.3d 398, 403-404 (7th Cir. 2009) (Easterbrook, J.); *Ruelas* v. *Wolfenbarger*, 580 F.3d 403, 413 (6th Cir. 2009); *Gongora* v. *Thaler*, 2013 WL 4080710, at *7-*8 (5th Cir. Aug. 13, 2013) (Smith, J., dissenting from denial of rehearing en banc). Having held in *Mitchell*, 540 U.S. at 17-19, that the AEDPA/*Chapman* test can be employed to deny federal habeas relief, the Court is free to follow the same course here. To argue otherwise would be to contend "that dicta have overtaken holdings," and thus to "reverse[] the accepted hierarchy of legal authority." *United States* v. *Askew*, 529 F.3d 1119, 1148 & n.3 (D.C. Cir. 2008) (Griffith, J., concurring) (citing, *inter alia*, *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend * * * .")).

The Sixth Circuit panel divided over whether "grave doubt" exists within the meaning of *O'Neal*. Compare Pet. App. 5a (majority opinion of Martin, J.) (expressing grave doubt "[b]ecause we cannot know what led the jury to make the decision that it did"), with *id.* at 29a (Cook, J., dissenting) ("Pure conjecture does not establish grave doubt.").

Petitioner makes a strong argument that the dissent got it right, and that any *Carter* error is therefore harmless under *Brecht*. Pet'r Br. 43-48. The Court need not go that far, however, because *Harrington*, *Mitchell*, and Section 2254(d) foreclose federal habeas relief unless this Court can say what the Sixth Circuit could not—namely, that the Kentucky Supreme Court would be objectively unreasonable to hold harmless any *Carter* error in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

JAMES P. SULLIVAN
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Sullivan@
texasattorneygeneral.gov
(512) 936-1700

September 2013